United States Court of Appeals

for the Second Circuit

APPENDIX

77-7177

B

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
MAR 31 1981
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Docket No. 75 Civ. 5891 (MJL)

JOHN F. MEEHAN and ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs-Appellees

-against-

JOHN SNOW and JUDY SNOW,

Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

VOGEL AND ROSENBERG
41 East 42nd Street
New York, New York 10017
(212) 599-3337
Attorneys for Defendants-Appellants

McCANN, RIDER, DRAKE, WEINER, SOMMERS and LOEB, P.C.
427 Little Britain Road
Post Office Box 991
Newburgh, New York 12550
(914)562-8700
Attorneys for Plaintiffs-Appellees

PAGINATION AS IN ORIGINAL COPY

INDEX

	Page
DOCKET ENTRIES	A-1
COMPLAINT	A-7
ANSWER	A-11
MEMORANDUM DECISION GRANTING PLAINTIFFS' MOTION TO AMEND THEIR COMPLAINT	A-18
PLAINTIFFS' AMENDED COMPLAINT	A-24
DEFENDANTS' ANSWER TO AMENDED COMPLAINT	A-30
PLAINTIFFS' RULE 55(b)(2) MOTION FOR JUDGMENT AGAINST THE DEFENDANTS BY DEFAULT	A-39
ROBERT FINK'S AFFIDAVIT IN SUPPORT OF PLAINTIFFS' RULE 55(b)(2) MOTION WITH ATTACHED EXHIBITS	A-41
DEFENDANTS' AFFIRMATION IN OPPOSITION TO PLAINTIFFS' RULE 55(b)(2) MOTION	A-61
ROBERT FINK'S REPLY AFFIDAVIT IN SUPPORT OF RULE 55(b)(2) MOTION WITH ATTACHED EXHIBITS	A-65
PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF RULE 55(b)(2) MOTION	A-103
PLAINTIFFS' NOTICE OF REJECTION WITH DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT ATTACHED	A-108
JUDGE WERKER'S MEMORANDUM DECISION DATED FEBRUARY 2, 1977 GRANTING PLAINTIFFS' RULE 55(b)(2) MOTION TO ENTER DEFAULT JUDGMENT	A-117

I N D E X

	Page
JUDGMENT ON DEFAULT DATED MARCH 7, 1977	A-120
DEFENDANTS' MOTION TO VACATE AND SET ASIDE THE DEFAULT JUDGMENT UNDER RULE 60(b)(1)	A-122
DEFENDANTS' AFFIDAVIT IN SUPPORT OF THEIR RULE 60(b)(1) MOTION	A-124
DONALD ROSENBERG'S AFFIDAVIT IN SUPPORT OF DEFENDANTS' RULE 60(b)(1) MOTION WITH ATTACHED EXHIBITS	A-135
DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF RULE 60(b)(1) MOTION	A-156
ROBERT FINK'S AFFIDAVIT IN OPPOSITION TO DEFENDANTS' RULE 60(b)(1) MOTION WITH ATTACHED EXHIBITS	A-163
JOHN MEEHAN'S AFFIDAVIT IN OPPOSITION TO DEFENDANTS' RULE 60(b)(1) MOTION WITH ATTACHED EXHIBITS	A-168
PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RULE 60(b)(1) MOTION	A-215
DEFENDANTS' REPLY AFFIDAVIT IN SUPPORT OF THE RULE 60(b)(1) MOTION	A-219
JUDGE WERKER'S MEMORANDUM DECISION DATED JULY 22, 1977 DENYING DEFENDANTS' 60(b)(1) MOTION	A-239
ORDER AMENDING DEFAULT JUDGMENT	A-244
FINAL SUPPLEMENTAL JUDGMENT DATED 9/24/80	A-245
DEFENDANTS' NOTICE OF APPEAL FROM THE DEFAULT JUDGMENT FILED ON MARCH 7, 1977	A-247
DEFENDANTS" NOTICE OF APPEAL FROM JUDGE WERKER'S DENIAL OF RULE 60(b)(1) RELIEF	A-249
DEFENDANTS' NOTICE OF APPEAL FROM THE JUDGMENT ENTERED ON SEPTEMBER 24, 1980	A-251

8-1	75	5891	11	20	75	4	190 A-1	2	14			0370		

PLAINTIFFS

MEEHAN & FINK, ESQS.

DEFENDANTS

JOHN SNOW
JUDY SNOW

Lowe

10/22

CAUSE

petition for removal; recover fees for legal services rendered

sls

ATTORNEYS

~~Meehan and Fink, Esqs., Pro Se~~
~~Route 17-M Box 391~~
~~Goshen, NY 10924~~
~~914-294-5421~~

~~Ticktin, Malkin~~ Rogit Marks and Rosenberg
477 Madison Ave, NYC 10022
758-3404

McCann Ahern & Sommers
Subst. 3-3-78
347 Fullerton Ave. Box 2335
Newburgh, N.Y. 12550

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CA
	DATE NOV 20 1975	RECEIPT NUMBER	C.D. NUMBER	CARD X DATE M.
		61515		JS-5
		0		JS-6

A-2

75 Civ. 5891 MEEHAN & FINK VS SNOW WERKER,J.

DATE	NR.	PROCEEDINGS
11-20-75	1	Filed ~~complaint~~ petition for removal from the Supreme Court, State of New York, county of Orange.
11-20-75	2	Filed bond #178E224-A for undertakng of removal in the amt. of $500.00 by the Travelers INdemnity Co,Hartford, Conn.
12-03-75	3	Filed notice of removal.
12-12-75	4	Filed stip. and order ext. defendants' time to answer to 12-19-75 -- Werker, J.
12-24-75	5	Filed ANSWER of defendants. TMSR
01-22-76	6	Filed stip. and order ext. pltfs time to reply is ext. to 1-30-76 -- Werker, J.
03-18-76	7	Filed pltfs ANSWER to counterclaim of defendants. MSEW
03-18-76	8	Filed pltfs interrog. to defts. on counterclaims.
04-16-76	9	Filed pltfs memorandum of law.
04-16-76	10	Filed pltfs affdvt. and notice of motion to amend complaint
06-16-76	11	Filed defts affirmation in opposition to motion to amend complaint.
06-28-76	12	Filed pltffs. reply affdvt. of JOHN F. MEEHAN.
07-09-76	13	Filed stip. and order ext. defts time to serve papers in opposition to pltfs motion for leave to amend complaint 6-14-76;, pltfs may serve reply affdvt. by 6-24-76, etc. -- Werker, J.
05-28-76	—	P.T.C. held. HPW
08-26-76	14	Filed Opinion #45016 that plaintiffs motion to amend complaint is granted without costs. So ordered - Werker, J. m/n
09-20-76	15	Filed AMENDED COMPLAINT with affdvt. of service.
10-18-76	16	Filed pltfs affdvt. and notice of motion for default pursuant to Rule 55(b)(2) -- ret. 10-27-76 (11-08-76 filed Clerk's certificate and attached hereto)
10-27-76	17	Filed deft's affirmation in opposition re motion #16.
11-08-76	18	Filed pltfs affdvt. in reply to filing of answer
11-08-76	19	Filed pltfs memorandum of law
11-22-76	20	Filed plaintiff's rejection to answer of deft. to amended complaint due to untimly service.
02-02-77	21	Filed MEMORANDUM-DECISION ...a judgment of default will be entered against defendants; however they will be given 30 days from the filing of this memorandum-decision in which to move to set aside their default. SUBMIT JUDGMENT. -- Werker, J. m/n
03-07-77	22	Filed JUGMENT ON DEFAULT #77,344...ordered that plaintiffs have judgment against defendants on the first cause of action in the total amount of $15,528.51 and that plaintiffs have execution thereof. Ordered that a hearing be set to determine the damages on the 2nd & 3rd causes of action; ordered that the counterclaims of defendants are dismissed with prejudice; defendants are given 60 days to move to set aside their default; plaintiffs are stayed from execution for 60 days from date of document #21 or 30 days following the date of filing of the decision of defts' motion, if timely made. - Werker, J. - Judgment entered - Clerk. m/n
4-5-77	23	Filed defts notice of motion to vacate & set aside a final judgment of default. Ret. 4-20-77
4-5-77	24.	Filed defts memo of law in support of motion.

VI-IVII DOCKET CONTINUATION SHEET

A-3

Law Enforcement

PLAINTIFF	DEFENDANT	DOCKET NO. 75-589.
MEEHAN & FINK	JOHN SNOW	PAGE 3 OF ___ PAGES

DATE	NR.	PROCEEDINGS
04-06-77	-25-	Filed defts notice of appeal to the USCA for the Second Circuit from Final Judgment on Default filed 3-7-77. mailed copy to Meehan & Fink
4-18-77	26.	Filed pltff (Robert Fink's) affdvt in answer to defts motion to set aside the default & vacate the Default Judgment.
4-18-77	27.	Filed affdvt of pltff (John Meehan) in opposition to motion to set aside a Default Judgment ent. by pltff.
4-18-77	28.	Filed pltffs memo of law re default.
5-6-77	29.	Filed Stip. & Order that the submission date of deft's motion to vacate the default judgement entered 3-7-77, be and the same hereby is adjourned to 3-19-77....So ordered Werker J.
5-4-77	30.	Filed True Copy Of USCA Stip. & Order dismissing appeal.
5-24-77	31.	Filed Deft's Reply Affdvt. in response to the affdvt. submitted by the pltffs to the motion to vacate the default judgement. etc. with affirmation of Atty attached.
8-18-77	-31A	Filed defts notice of appeal to the USCA for the Second Circuit from Order of 7-22-77. Mailed copy to Meehan & Fink
8-23-77	32	Filed UNSIGNED ORDER to show cause for order staying enforcement of judgment of 3-7-77 etc. With Memo Endorsed.....Motion Denied....Werker,J....m/n
08-22-77	33	Filed defts memorandum in support of defts motion for relief as set forth in the order to show cause dated 8-18-77
8-31-77	34.	Filed defts Show Cause Order revising the judgment pursuant to Rule 54(b), ent. 3-7-77, enjoining & staying pltffs re execution & enforcement of that part of the aforesaid judgment relating to the first cause of action of pltffs amended complt. Ret. 9-30-77
8-31-77	35.	Filed defts memo of law re SCO.
7-22-77	36.	Filed Opinion #46203 & Order. Deft moved under Rule 60(b)(1) to se aside a default judgment ent. 2-77. In August, 1976, this Court granted pltffs motion to amend their complt. When defts failed to answer the amended complt within the time permitted, pltffs moved t enter a default judgment. In Feb. 1977 that motion was granted wit leave given to defts to move to set aside the default. Defts motio is denied for the reasons stated. So Ordered, WERKER,J. n/m
9-23-77	37.	Filed pltffs affdvt in answer to SCO dtd8-19-77 re amendment of judgment dtd 3-7-77.
9-23-77	38.	Filed notice that original record on appeal has been Certified & transmitted to the USCA.

DC-111A REV. (1/75)

CIVIL DOCKET CONTINUATION SHEET

A-4

Sheet 1

PLAINTIFF	DEFENDANT	DOCKET NO. 75-5891
MEEHAN & FINK	JOHN SNOW & JUDY SNOW	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
7-22-77	36	Filed Memorandum Decision #46203 & Order. Defts have moved to set aside a default judgment ent. Feb. 1977. Pltff, atty's appearing pro se began an action in the Supreme Court, Orange County, to col fees allegedly owed them re sale of defts home & in foreclosure li gation. In Nov. 1975, defts removed the action to the USDC, SDNY. Defts answer, containing counterclaims, charged pltffs with neglig etc. This Court granted pltffs motion to amend their complt. Whe defts failed to answer the amended complt, pltffs moved to enter a default judgment. In Feb. 1977 that motion was granted with leave given to the defts to move to set aside the default under Rule 60(For the reasons stated, Counsel for defts having failed to carry h burden of proof re Rule 60(b) which requires a demonstration of a good reason for the default, it is unnecessary for the court to address whether or not the defts have asserted a meritorious defen to the action. Defts motion is denied. So Ordered, WERKER,J. n/

~~Atty's for Pltff~~
~~Meehan & Fink~~
~~Route 17 M, P. O. Box 391~~
~~Goshen, N. Y. 10924~~

Atty for Defts
Vogel Marks & Rosenberg
477 Madison Ave.
NYC 10022

DC-111A REV. (1/75)

A-5

DATE	NR	PROCEEDINGS
10-12-77	39.	Filed Memo-End. on Show Cause Order dtd 8-31-77. Motion to amend the default judgment is granted.....WERKER,J. n/m
10-14-77	40.	Filed Order amending judgment ent. 3-8-77, that pltffs are stayed from causing execution & enforcement of the judgment until 30 days following entry of a final judgment to be entered on the second & third causes of action. So Ordered, WERKER,J. n/m
10-19-77	41.	Filed True Copy of Mandate from the USCA that the appeal is withdrawn without prejudice to a renewal thereof, after final judgment is ent. on all causes of action herein, or an appeal is otherwise appropriate.....So Ordered, Clerk. n/m
12-12-77	42.	Filed Order that this action is referred to Magistrate Schreiber for the purpos of conducting an inquest on the second & third causes of action as set forth in t default judgment as amended on 10-14-77. So Ordered, WERKER,J. n/m
3-3-78	43.	Filed Order that the firm of McCann, Ahern& Sommers are substitute in place of Meehan & Fink as attys for prosecution of the affirmat of the action.....MAGISTRATE SCHREIBER.
3-7-78	44.	Filed affdvt of Robert Fink (pltff) re motion to withdraw as atty & be substituted.
4-11-78	45.	Filed legal memorandum by pltff.
6-1-78	-	CASE REASSIGNED TO JUDGE SWEET. ATTORNEYS NOTIFIED
8-7-78		VASE REASSIGNED TO JUDGE LOWE, ATTY SNOTIFIED
8-17-78		[illegible] CONFERENCE FILE BY [illegible]
02-5-79	46	Filed order that [illegible] referred to Magistrate Raby for purposes indicated. Lowe, J. m/n
2-2-79	—	[illegible] Lowe, J.
3-9-79	—	[illegible] Lowe, J.
10-31-79	(47)	FILED TRANSCRIPT OF RECORD OF PROCEEDING BEFORE RABY,US MAG. Dated. June 11, 1979
11-1-79	48	Filed Report of U.S. Magistrate. RABY, MAG. COPIES MAILED
12-17-79	49	Filed defts' OBJECTIONS to the Report of Mag. Raby.
1-2-80	50	Filed Pltffs. Legal Memorandum.
6-24-80	51	Fld Memo Opinion & Order #50225....This Court hereby awards pltff Meehan $1,000 general compensatory damages as against deft J. Snow & $1,000 general compensatory damages as against John Snow....Submit Judgment...Lowe, J. m/n
9-12-80	52	Fld. order amending memorandum opinion and order...Opinion #50585..Lowe,J. m/n

CIVIL DOCKET CONTINUATION SHEET

[A-6]

FPI-M1—3-14-75 50M-3511

PLAINTIFF	DEFENDANT	DOCKET NO.
MEEHAN -v- SNOW	LOWE J 75 civ 5891	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
9/24/80	53	Filed JUDGMENT # 80,1104 re pltff Meehan to reoover of dft Judy Snow a total of $1,016.68 including interest & LOWE-J. JDGMT entered 9/24/80 CLERK m/n
10-22-80	54	Fld. Notice of Appeal to the USCA-2nd Circuit from the Final Judgment on Defaul filed on March 7, 1977as amended by the Order of Judge H. Werker filed in this action on 10/14/77 and from the whole of said Judgment. Sent copies to McCann, Ahern & Sommers, P.C. Newburgh, N.Y. 12250.
10-22-80	55	Fld. Notice of Appeal to the USCA-2nd Circuit from the Order of Judge Werker filed on 7/22/77 denying defendants' motion for relief under Rule 60(b (1) of the F.R.C.P. and from the whole said Order. Sent copies to McCann, Ahern & Sommers, P.C. Newburgh, New York 12550.
10-22-80	56	Fld. Notice of Appeal to the USCA-2nd Circuit from the Judgment entered on Sept. 24, 1980.. and from the whole of said Judgment. Copies sent to: McCann, Ahern & Sommers, P.C. Newburgh, New York 12550.

A-7

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

----------x

MEEHAN & FINK, ESQS.,

Plaintiffs,

- against -

JOHN SNOW and JUDY SNOW,

Defendants.

COMPLAINT

J 702/75

----------x

Plaintiffs, as attorneys pro se, allege:

1. That at all times hereinafter mentioned, plaintiffs were and still are attorneys and counsellors at law, duly licensed and admitted as such.

2. That plaintiffs are now a partnership consisting of John F. Meehan and Robert W. Fink, with a place of business located at Route 17M, Goshen, New York, and that the moneys due plaintiff or plaintiffs for professional services rendered and disbursements expended are an account due the partnership.

3. That the defendants are domiciliaries of the State of Pennsylvania, residing at R. D. #7, Carlisle, Pennsylvania.

4. That the transactions complained of occurred in the State of New York, County of Orange.

5. That between the dates of December, 1973, and September, 1975, plaintiff or plaintiffs performed professional services for defendants, at their instance and request.

6. That the defendants agreed to pay plaintiffs the reasonable value of their services together with disbursements necessarily incurred.

7. That plaintiff or plaintiffs necessarily expended approximately 33.75 hours in defendants' behalf in the matter of applications before the Planning Board, Town of Goshen, County of Orange and an Article 78 proceeding thereafter. That the fair and reasonable value of said services is $75.00 per hour, and that no part has been paid although duly demanded.

8. That plaintiff or plaintiffs necessarily expended approximately 51.7 hours in defendants' behalf in the matter of the defense of a suit for commissions brought in the Supreme Court, County of Orange. That the fair and reasonable value for said services is $50.00 per hour, and that no part has been paid although duly demanded.

9. That the plaintiff or plaintiffs necessarily expended approximately 182.9 hours in defendants' behalf in the prosecution of a mortgage foreclosure action, brought in Supreme Court, Orange County. That the fair and reasonable value for said services is $50.00 per hour and that to date only THIRTY TWO DOLLARS NINETY NINE CENTS ($32.99) has been paid, although the total sum has been duly demanded.

10. That the plaintiff or plaintiffs necessarily incurred TWO HUNDRED SEVENTY NINE DOLLARS EIGHTY FIVE CENTS ($279.85) in disbursements in the aforementioned matters, and that ONE HUNDRED NINETY ONE DOLLARS SIXTY CENTS ($191.60) has been paid, although the total sum has been duly demanded.

WHEREFORE plaintiffs demand judgment against the defendants, joint and several, in the amount of FOURTEEN THOUSAND THREE HUNDRED SIXTEEN DOLLARS FIFTY ONE CENTS ($14,316.51) with interest, together with costs and disbursements and whatever other relief as to the court may seem just.

MEEHAN & FINK, ESQS.
Attorneys pro se
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

A-10

has been compared by me with the original and found to be a true and complete copy thereof.

Attorney's Verification by Affirmation

say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

affirm that the foregoing statements are true under penalties of perjury.

Dated:

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ORANGE ss:

ROBERT W. FINK being sworn says: I am one of the plaintiffs

☒ Individual Verification

in the action herein: I have read the annexed Complaint know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification

the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on October 1st, 1975

(Print signer's name below signature)

ROBERT W. FINK

Notary Public, My commission expires 3/30/7

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 19 , I served a true copy of the annexed in the following manner:

☐ Service By Mail

by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service

by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on , 19

(Print signer's name below signature)

IA-11

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

MEEHAN & FINK, ESQS.,

Plaintiffs,

-against-

VERIFIED ANSWER

JOHN SNOW and JUDY SNOW,

Index No. 75 CIV 5891

Defendants.

Defendants, by their attorneys, TICKTIN MALKIN & ROSENBERG, answer the complaint herein as follows:

1. Admits the allegations of the paragraphs of the Complaint numbered "3", "5", and "6".

2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph of the Complaint numbered "1".

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the Complaint numbered "2", except denies that there are any monies due plaintiff or plaintiffs for professional services rendered and disbursements expended.

4. Denies the allegations of paragraph "4" of the Complaint except admits that certain of the transactions complained of occured in the State of New York, County of Orange.

5. Denies the allegations of paragraph numbered "10" of the Complaint, except admit that ONE HUNDRED AND NINETY-ONE DOLLARS AND SIXTY CENTS ($191.60) has been paid.

6. Denies the allegations of the paragraphs of the Complaint numbered "7", "8", and "9".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

7. This Court lacks jurisdiction over the subject matter of the claim against defendants.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

8. This Court lacks jurisdiction over the persons of the defendants.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

9. The Complaint fails to state a claim against defendants upon which relief may be granted.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

10. Defendants deny that the work, labor, and services alleged in plaintiffs' complaint herein, to have been performed for defendants by plaintiffs, were of the fair and reasonable value of FOURTEEN THOUSAND THREE HUNDRED AND SIXTEEN DOLLARS AND SIXTY-ONE CENTS ($14,316.61).

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

11. The plaintiffs herein have no legal capacity to sue and cannot maintain this action in that they are not the real party in interest.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
AND AS AND FOR A COUNTERCLAIM AGAINST PLAINTIFFS:

12. At all times hereinafter mentioned defendants are and were residents of the State of Pennsylvania.

13. At all times hereinafter mentioned plaintiffs were and still are attorneys and counsellors-at-law, duly licensed admitted as such having offices at Route 17M, Goshen, New York.

14. In or about May, 1973, defendants retained the services of JOHN MEEHAN, ESQ., as attorney to represent defendants in certain matters including, but not limited to, the negotiation and sale of defendants' residence in Goshen, New York.

15. Plaintiff, JOHN MEEHAN, thereafter accepted said retainer and employment as the attorney for defendants and undertook the total representation of defendants in the aforesaid matter in a proper, skillful and professional and diligent manner.

16. Defendants fully and fairly stated to plaintiff, JOHN MEEHAN, ESQ., the facts constituting the circumstances relating to the sale of defendants' aforesaid residence.

17. Plaintiff, JOHN MEEHAN, thereafter formed a partnership with one ROBERT W. FINK, both of whom are plaintiffs in the within action and who continued the representation of defendants in the varied services required to prosecute a foreclosure claim and subsequent resistance to the vacating of a judgment of foreclosure and sale as a result of default

by JOHN TOMICKI, the original contract purchaser of defendants' residence in Goshen, New York.

18. Notwithstanding plaintiffs' professional responsibility to diligently, competently and professionally render legal services to defendants in the aforesaid matter, plaintiffs have wholly failed to exercise their responsibility to defendants in that they failed to protect the rights of defendants as mortgagees and sellers of said residence, negligently, carelessly and unskillfully advised and induced defendants to accomodate unreasonable requests by the said JOHN TOMICKI, failed to advise defendants of all transactions having relevance to the aforesaid matters, in that plaintiffs acted in an unprofessional manner and in dereliction of their professional responsibility to defendants in violation of their retainer by failing to protect the interests of defendants and causing certain conditions which resulted in prejudice to defendants' interests all of which are in violation of the standard of professional conduct for which plaintiffs were charged in rendering services on defendants' matters as aforesaid.

19. Solely by reason of the foregoing negligence of plaintiffs, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE AND SECOND COUNTERCLAIM AGAINST PLAINTIFFS:

20. Defendants repeat and reallege paragraphs numbered "12" through "18" inclusive, as if same were more fully set forth herein.

21. Plaintiffs contracted with the defendants as part of the agreement of retainer, to perform services on behalf of defendants in a professional and skilled manner.

22. By failing to provide said services in furtherance of said retainer agreement and in otherwise acting in an unprofessional manner in violation of said retainer agreement, plaintiffs breached their aforesaid agreement and contract with defendants.

23. Solely by reason of the foregoing breach of contract by plaintiffs, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE AND THIRD COUNTERCLAIM AGAINST PLAINTIFFS:

24. Defendants repeat and reallege paragraphs numbered "12" through "18" as if more fully set forth herein.

25. Plaintiffs in certain respects, acted wilfully in conflict of interest with respect to certain transactions between plaintiffs and each of them and JOHN TOMICKI in prejudice of defendants' rights, which conflict of interest was known to plaintiffs and upon which they acted adverse to defendants' interests.

26. By reason of the foregoing acts of plaintiffs and their failure to act, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

WHEREFORE, defendants demand judgment dismissing the complaint, costs and disbursements in defending this action, including reasonable attorneys' fees and for judgment against plaintiffs, joint and several, on defendants' counterclaims in the total cumulative sum of ONE MILLION FIVE HUNDRED THOUSAND ($1,500,000.00) DOLLARS with interest together with costs and disbursements.

TICKTIN MALKIN & ROSENBERG

By: _____
A Member of the Firm
Attorneys for Defendants
477 Madison Avenue
New York, N.Y. 10022
(212) 758-3404

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DONALD B. ROSENBERG, being duly sworn, deposes and says, that he is a member of the firm of TICKTIN MALKIN & ROSENBERG, attorneys for defendants in this action and that the foregoing answer is true to his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true; that the grounds of his belief as to all matters not stated upon his knowledge are correspondence and other writings furnished to him by defendants and interviews with defendants; and that the reason why the verification is not made by defendants is that defendants are not residents of the State of New York.

Sworn to before me this
19th day of December, 1975.

DONALD B. ROSENBERG

JOHN B. MARVIN
Notary Public, State of New York

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action: deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is

Check Applicable Box

☐ Individual Verification — the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF New York ss.:

Elaine Solomon being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Kings County

Check Applicable Box

☒ Affidavit of Service By Mail — On December 19 19 75 deponent served the within Verified Answer upon Meehan & Fink, Esqs. attorney(s) for Plaintiffs in this action, at Route 17M, Box 391, Goshen, New York 10924 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — ~~xxxxxxxx~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on December 19 19 75

.....
The name signed must be printed beneath
Elaine Solomon

DONALD B. ROSENBERG
Notary Public, State of New York
No. 60-3350430
Qualified in Westchester County
Commission Expires March 30, 1977

Copy

U.S. DISTRICT COURT
FILED
AUG 26 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - -

While the defendants have consented to amending the complaint with respect to the correction of the name of the plaintiffs and to the adding of a pro forma allegation of performance, they have vigorously objected to the addition of the two causes of action for defamation.

Defendants set forth three arguments in opposing plaintiffs' motion:

1. The proposed amendments in question are wholly unrelated to the main thrust of the primary cause of action, and thus should not be adjudicated within the same proceeding.

2. The proposed amendments are mere retaliation against defendants' counter-claim, as demonstrated by the lack of evidentiary facts indicating the circumstances whereby the alleged slanderous remarks came to the plaintiffs' attention only as late as December 1975.

3. The defendants would be severely and irreparably prejudiced by the proposed amendments in that they would be forced to defend expanded claims not previously asserted by plaintiffs, with consequential costs and delays.

Rule 15 (a) of the Federal Rules of Civil Procedure states that a party may amend a pleading by leave of court or written consent of the adverse party where amendment as a matter of course is unavailable.[1] In determining whether to grant the plaintiffs' motion for leave to amend the complaint, the court must first consider the clause in Rule 15 (a) which states that "leave shall be freely given when justice so requires." The cases are in clear agreement that leave shall indeed be freely given in the absence of good reason to deny it. Foman v. Davis, 371 U.S. 178, 182 (1962); Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 287 (2d Cir. 1974); United States v. International Business Machines Corp., 66 F.R.D. 223, 228 (S.D.N.Y. 1975). In Foman v. Davis, supra at 182, the Supreme Court gave several examples of what such good reason for denial of leave to amend could be: undue

delay, bad faith or dilatory motive, repeated failure to cure deficiencies still existing despite previously allowed amendments, and undue prejudice to the opposing party.

Rule 15(a) implicitly requires that the amendment be sought in good faith, that it not be sought as a dilatory measure and that it not prejudice the other side. Billy Baxter, Inc v. Coca-Cola Co., 47 F.R.D. 345 (S.D.N.Y. 1969), aff'd, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971). Defendants' allegation that the plaintiffs are acting vindictively is conclusory and without factual support. It appears that the good faith requirement has been met in that the movants have made a prima facie showing of their ability to establish factual support for the new matters sought to be pleaded. The plaintiffs, in the proposed amended complaint, have alleged that defamatory remarks were made in front of named third persons by the defendants, words falsely spoken with the intent to damage plaintiff Meehan's reputation as an attorney. While the additional causes of action were not sought to be included as amendments until several months after the complaint had already been filed, plaintiffs assert that they did not become aware of the alleged defamatory statements until December 20, 1976, after the complaint and answer had both been filed. They further claim that they were not able to take action on this matter until several months later because of the natural reluctance of those people who had heard the alleged derogatory remarks to become involved. Consequently, there seems to be no dilatory motive on the part of plaintiffs in making this motion.

The factor of prejudice to the opposing party is the main consideration on which the courts have focused in considering motions for leave to amend pleadings. United States v. Hougham, 364 U.S. 310, 316 (1960); Strauss v. Douglas Aircraft Co., 404 F.2d 1152, 1155 (2d Cir. 1968); Middle Atlantic Utilities

Co. v. S.M.W. Development Corp., 392 F.2d 380, 384 (2d Cir. 1968). Defendants claim they will be prejudiced because they will have to defend against expanded claims and thus they will incur additional legal fees as a result of further discovery and may suffer delay in the trial of the action.

The defendant in Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra, made objections similar to those set forth by the defendants in the instant case. In that case, the defendant argued that the granting of leave to amend would necessitate additional expensive and time-consuming procedures such as additional discovery and more motions. The court, while granting the defendant summary judgment on other grounds, reversed the district court's denial of plaintiff's motion for leave to amend its complaint and noted that such prejudice was inadequate to sustain the denial of plaintiff's motion. Id. at 386.

The court in United States v. International Business Machines Corp., supra at 230, similarly held that prejudice such as additional discovery, resultant delay in going to trial, or increased complexity of litigation is not sufficient to defeat a motion for leave to amend a pleading. The court noted that, "/t/hose courts which have denied leave to amend on the ground of prejudice to the opposing party have focused their analysis on prejudice to that party's ability to litigate the merits of its case." Id.

The defendants have made no claims that their ability to litigate the merits of the case will be hampered if leave to amend is granted. Their claims that greater costs and additional time will be required do not demonstrate that their ability to litigate the merits of the case will be lessened. Furthermore, greater costs and time would be necessitated even if plaintiffs' motion was to be denied, since plaintiffs would then be required to bring their claims in a separate action.

Defendants' argument that the proposed causes of action are

unrelated to the primary action, standing alone, bears little weight, since courts have often granted leave to amend even where a new cause of action has been introduced in the absence of a showing of prejudice to the defendant. Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra; United States v. International Business Machines Corp., supra; Gomez v. Miller, 337 F. Supp. 386 (S.D.N.Y. 1971). Cases have also held that leave to amend a pleading may be granted even where completely new theories of relief are introduced as a result. Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273, 280 (S.D.N.Y. 1970); Dombrovskis v. Murff, 24 F.R.D. 302, 304 (S.D.N.Y. 1959). Furthermore, the allegedly slanderous statements in the instant case concern the services which plaintiffs had rendered and for which they are seeking payment. Thus there is some factual connection between the proposed amendments and the original complaint in any event.

Because the defendants have failed to demonstrate any good reason for the denial of the motion, plaintiffs' motion for leave to amend the complaint is granted.

The defendants have urged that if this court were to grant plaintiffs' motion, it do so only on the condition that plaintiffs file an undertaking to cover the costs incurred by defendants in responding to this motion, if plaintiffs are not sustained on the additional causes of action.

It is within this court's discretion to impose conditions when leave to amend a pleading is granted. Key Pharmaceuticals, Inc. v. Lowey, 54 F.R.D. 447 (S.D.N.Y. 1970); Maynard, Merel & Co v. Carcioppolo, supra at 280. Courts which have placed such conditions on grants of leave to amend pleadings generally have done so to offset the prejudice which would have otherwise resulted to the opposing party. As pointed out in 3 J. Moore, Federal Practice para. 15.08[6], at 935 (2d ed.

1974), "possible prejudice which might otherwise result from granting leave to amend may be avoided or minimized" by imposing terms on the granting of leave.

In Shelley v. The Maccabees, 26 F.R.D. 10 (S.D.N.Y. 1960), the court granted defendant insurance company's motion to amend its answer by adding additional affirmative defenses to its answer. The court, however, imposed the condition that the defendant would have to restore certain rights which plaintiff policy holder had at the time the original answer had been filed, but which had been lost by the time the motion for leave to amend was made. Thus, the condition was imposed to neutralize the prejudice to plaintiff which otherwise would have occurred by the plaintiff's reliance on the original answer.

There is no comparable showing of prejudice in the instant case, nor does there seem to be any need for imposing any conditions on the granting of plaintiffs' motion. The expenditure of additional costs required by plaintiffs' amendment is not sufficiently prejudicial to defendants to warrant the imposition of any terms, particularly in view of the fact that such costs would be incurred regardless if plaintiffs were to initiate a separate defamation action.

The plaintiffs' motion for leave to amend the complaint is granted, without costs.

SO ORDERED.

DATED: New York, New York

August 25, 1976

Henry F. Werker

U. S. D. J.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a MEEHAN & FINK,	)	
Plaintiffs,	)	AMENDED COMPLAINT
- against -	)	Civil Action; File #75-5891
JOHN SNOW AND JUDY SNOW,	)	
Defendants.	)	

Plaintiffs, for their claim for relief against the defendants, respectfully allege:

AS A FIRST CAUSE OF ACTION IN BEHALF
OF JOHN F. MEEHAN AND ROBERT W. FINK
AGAINST JOHN SNOW AND JUDY SNOW

1. That this action was commenced against the defendants in the Supreme Court of the State of New York, Orange County, and removed to the United States District Court for the Southern District of New York by Petition of the defendants filed on the 20th day of November, 1975, upon the ground that the controversy between the plaintiffs and defendants is founded on diversity of citizenship and amount. Plaintiffs are citizens of the State of New York, residing and doing business in the County of Orange, and defendants are citizens of the State of Pennsylvania, residing at Carlisle, Pennsylvania. The matter in controversy exceeds, exclusive of interest and cost, the sum of TEN THOUSAND ($10,000.00) DOLLARS.

2. That the transactions complained of arose from the transaction of business by the defendants in the State of New York.

3. That at all times hereinafter mentioned, plaintiffs were and continue to be attorneys and counsellors at law, duly licensed and admitted to practice in the State of New York, with a place of business in the Town of Goshen, County of Orange, State of New York.

4. That plaintiffs formed a partnership on or about January, 1975, that at all times hereinafter mentioned consisted of John F. Meehan and Robert W. Fink, with a place of business located at Route 17M, Goshen, New York, and that the moneys due plaintiff or plaintiffs for professional services rendered and disbursements expended are an account due the partnership.

5. That between the dates of December, 1973 and September, 1975, plaintiff or plaintiffs performed professional services for defendants, at their instance and request.

6. That the defendants agreed to pay plaintiffs the reasonable value of their services together with disbursements necessarily incurred.

7. That plaintiff or plaintiffs necessarily expended approximately 33.75 hours in defendants' behalf in the matter of applications before the Planning Board, Town of Goshen, County of Orange, New York, and an Article 78 proceeding thereafter, brought before the Supreme Court, County of Orange, New York. That the fair and reasonable value of said services is $75 per hour, and that no part has been paid, although duly demanded.

8. That plaintiff or plaintiffs necessarily expended approximately 51.7 hours in defendants' behalf in the matter of the defense of

a suit for commissions brought against defendant Judy D. Snow in the Supreme Court, County of Orange, New York. That the fair and reasonable value for said services is $50 per hour, and that no part has been paid, although duly demanded.

9. That the plaintiff or plaintiffs necessarily expended approximately 182.9 hours in defendants' behalf in prosecution of a mortgage foreclosure action, brought in the Supreme Court, County of Orange, New York. That the fair and reasonable value of said services is $50 per hour and that to date only $32.99 has been paid, although the total sum has been demanded.

10. That the plaintiff or plaintiffs necessarily incurred $279.85 in disbursements in the aforementioned matters, and that $191.60 has been paid, although the total sum has been duly demanded.

11. That plaintiffs duly performed all terms and conditions of their agreements with the defendants.

12. That due to the aforesaid, plaintiffs demand judgment against the defendants as hereinafter set forth.

AS A SECOND CAUSE OF ACTION IN BEHALF OF
JOHN F. MEEHAN AGAINST JUDY SNOW

13. Plaintiff John F. Meehan repeats, reiterates and realleges each and every allegation in paragraphs of the Complaint designated "1" through "11" as though more fully set forth herein.

14. That commencing 1950 plaintiff John F. Meehan has and continues to practice law in the State of New York, with a place of business located in the Town of Goshen.

15. That at all times, plaintiff John F. Meehan has borne a good reputation for integrity and professional competence in said Town and in and about Orange County and surrounding counties.

16. That heretofore and on or about the 28th day of July, 1975 defendant Judy Snow, while in the presence of James Mari and Helen Mari in the Town of Chester, County of Orange, State of New York, and referring to John Meehan's work in behalf of Judy Snow and John Snow, stated: that "He is incompetent", that "He messed up the sale of the house property to the owner of the Montgomery Nursing Home", that "We lost $100,000 because of John Meehan", that "He really screwed everything up", and that "He goofed everything up".

17. That the words so spoken were false and defamatory, were known to the defendant Judy Snow to be false and defamatory, and were spoken recklessly, carelessly, willfully and maliciously and with intent to damage plaintiff's good name and reputation as an attorney.

18. That by reason of the words so spoken by the defendant Judy Snow, the plaintiff John F. Meehan has been injured in his good name and credit as an attorney and said words have and will cast a strong stigma upon his standing as an attorney in the Town of Goshen, County of Orange and surrounding counties, and will work greatly to his injury in obtaining clients and to his practice in the future, all to his damage in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

19. That due to the aforesaid, plaintiff John F. Meehan demands judgment against the defendant Judy D. Snow as hereinafter set forth

AS A THIRD CAUSE OF ACTION IN
BEHALF OF JOHN MEEHAN AGAINST JOHN SNOW

20. Plaintiff John F. Meehan repeats, reiterates and realleges each and every allegation contained in paragraphs of the Complaint designated "1" through "16" as more fully set forth herein.

21. That heretofore and on or about the 7th day of October, 1975, the defendant John Snow, while in the presence of Martyn Taub, Esq., and Arthur Kabinoff in the Village of Suffern, Town of Ramapo, County of Rockland, State of New York, and referring to John Meehan's work in behalf of John Snow and his wife, Judy Snow, stated: that "When John should have been doing the job he was probably out playing golf", that "When he should have been doing the job, John told me he was out of town with his wife", that "He was probably out drinking because he sounded like he didn't know what he was talking about whenever I spoke with him", and "Whenever I spoke with John he sounded like he was drinking; he didn't seem to remember from one time to the next what he said."

22. That the words so spoken were false and defamatory, were known to the defendant John Snow to be false and defamatory, and were spoken recklessly, carelessly, willfully and maliciously and with intent to damage plaintiff's good name and reputation as an attorney.

23. That by reason of the words so spoken by the defendant John Snow, the plaintiff John F. Meehan has been injured in his good name and credit as an attorney and said words have and will cast a strong stigma upon his standing as an attorney in the Town of Goshen, County of Orange,

and surrounding counties, and will work greatly to his injury in obtaining clients and to his practice in the future, all to his damage in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

WHEREFORE plaintiffs demand judgment as follows:

1. For plaintiffs John F. Meehan and Robert W. Fink against John Snow and Judy Snow on the first cause of action in the sum of FOURTEEN THOUSAND THREE HUNDRED SIXTEEN DOLLARS FIFTY ONE CENTS ($14,316.51);

2. For plaintiff John F. Meehan against Judy Snow on the second cause of action in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS:

3. For plaintiff John F. Meehan against John Snow on the third cause of action in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS:

4. For plaintiff John F. Meehan against John Snow and Judy Snow the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS as exemplary and punitive damages;

5. For interest, costs and disbursements; and

6. For such other and further relief as to the court may seem just and proper.

MEEHAN & FINK, ESQS.

By _____

A member of the firm
Attorneys Pro Se
Office & P. O. Address
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

A-80

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a/
MEEHAN & FINK

Plaintiffs,

-against-

JOHN SNOW and JUDY SNOW,

Defendants.

ANSWER TO
AMENDED COMPLAINT

Index No. 75 CIV5891

Defendants, by their attorneys, VOGEL MARKS & ROSENBERG, as successor to TICKTIN MALKIN & ROSENBERG a dissolved law partnership, as and for their answer to the amended complaint, hereby allege as follows:

1. Admits the allegations in the paragraphs of the Complaint numbered "1", "2", "5" and "6".

2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs of the Complaint numbered "3" and "14".

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of the Complaint numbered "4", except denies there are any monies due plaintiff or plaintiffs for professional services rendered and disbursements expended.

4. Denies each and every allegation contained in paragraphs of the Complaint numbered "7", "8", "9", "11", "15", "16", "17", "18", "21", "22" and "23".

5. Denies the allegations of paragraph numbered "10" of the Complaint, except admits that ONE HUNDRED AND NINETY-ONE DOLLARS AND SIXTY CENTS ($191.60) has been paid.

6. Repeats, reiterates and realleges each and every admission, allegation and denial contained in paragraphs "1" through "5" of this answer insofar as they relate to the allegations in the paragraphs of the Complaint numbered "13" and "20".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

7. This Court lacks jurisdiction over the subject matter of the claim against defendants.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

8. This Court lacks jurisdiction over the persons of the defendants.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

9. The Complaint fails to state a claim against defendants upon which relief may be granted.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

10. Defendants deny that the work, labor, and services alleged in plaintiffs' complaint herein, to have been performed for defendants by plaintiffs, were of the fair and reasonable value of FOURTEEN THOUSAND THREE HUNDRED AND SIXTEEN DOLLARS AND SIXTY-ONE CENTS ($14,316.61).

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

11. The plaintiffs herein have no legal capacity to sue and cannot maintain this action in that they are not the real party in interest.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

12. This action is barred by the doctrine of laches.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

13. Plaintiffs have no legal capacity to sue and cannot maintain this action.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

14. Plaintiffs cannot maintain this action and have no legal capacity to sue in that they are not the real party in interest.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

15. Plaintiffs had a generally bad reputation at the time the words complained of were allegedly spoken by defendants.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE AND AS
AND FOR A COUNTERCLAIM AGAINST PLAINTIFFS:

16. At all times hereinafter mentioned defendants are and were residents of the State of Pennsylvania.

17. At all times hereinafter mentioned plaintiffs were and still are attorneys and counsellors-at-law, duly licensed admitted as such having offices at Route 17M, Goshen, New York.

18. In or about May, 1973, defendants retained the services of JOHN MEEHAN, ESQ., as attorney to represent defendants in certain matters including, but not limited to, the negotiation and sale of defendants' residence in Goshen, New York.

19. Plaintiff, JOHN MEEHAN, thereafter accepted said retainer and employment as the attorney for defendants and undertook the total representation of defendants in the aforesaid matter in a proper, skillful and professional and diligent manner.

20. Defendants fully and fairly stated to plaintiff, JOHN MEEHAN, ESQ., the facts constituting the circumstances relating to the sale of defendants' aforesaid residence.

21. Plaintiff, JOHN MEEHAN, thereafter formed a partnership with one ROBERT W. FINK, both of whom are plaintiffs in the within action and who continued the representation of defendants in the varied services required to prosecute a foreclosure claim and subsequent resistance to the vacating of a judgment of foreclosure and sale as a result of a default by JOHN TOMICKI, the original contract purchaser of defendants' residence in Goshen, New York.

22. Notwithstanding plaintiffs' professional responsibility to diligently, competently and professionally render legal services to defendants in the aforesaid matter, plaintiffs have wholly failed to exercise their responsibility to defendants in that they failed to protect the rights of defendants as mortgagees and sellers of said residence, negligently, carelessly and unskillfully advised and induced defendants to accomodate unreasonable requests by the said JOHN TOMICKI, failed to advise defendants of all transactions having relevance to the aforesaid matters, in that plaintiffs acted in an unprofessional manner and in dereliction of their professional responsibility to defendants in violation of their retainer by failing to protect the interests of defendants and causing certain conditions which resulted in prejudice to defendants' interests all of which are in violation of the standard of professional conduct for which plaintiffs were charged in rendering services on defendants' matters as aforesaid.

23. Solely by reason of the foregoing negligence of plaintiffs, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE
AND SECOND COUNTERCLAIM AGAINST PLAINTIFFS:

24. Defendants repeat and reallege paragraphs numbered "16" through "22" inclusive, as if same were more fully set forth herein.

25. Plaintiffs contracted with the defendants as part of the agreement of retainer, to perform services on behalf of defendants in a professional and skilled manner.

26. By failing to provide said services in furtherance of said retainer agreement and in otherwise acting in an unprofessional manner in violation of said retainer agreement, plaintiffs breached their aforesaid agreement and contract with defendants.

27. Solely by reason of the foregoing breach of contract by plaintiffs, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
AND THIRD COUNTERCLAIM AGAINST PLAINTIFFS:

28. Defendants repeat and reallege paragraphs numbered "12" through "18" as if more fully set forth herein.

29. Plaintiffs in certain respects, acted wilfully in conflict of interest with respect to certain transactions between plaintiffs and each of them and JOHN TOMICKI in prejudice of defendants' rights, which conflict of interest was known to plaintiffs and upon which they acted adverse to defendants' interests.

30. By reason of the foregoing acts of plaintiffs and their failure to act, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

WHEREFORE, defendants demand judgment dismissing the complaint, costs and disbursements in defending this action, including reasonable attorneys' fees and for judgment against plaintiffs, joint and several, on defendants' counterclaims in the total cumulative sum of ONE MILLION FIVE HUNDRED THOUSAND ($1,500,000.00) DOLLARS with interest together with costs and disbursements.

VOGEL MARKS & ROSENBERG
As successor to Ticktin Malkin
& Rosenberg, a dissolved law
partnership

By: _____
A Member of the Firm
Attorneys for Defendants
477 Madison Avenue
New York, N. Y. 10022
(212) 758-3404

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DONALD B. ROSENBERG, being duly sworn, deposes and says, that he is a member of the firm of VOGEL MARKS & ROSENBERG, attorneys

A-37

for defendants in this action and that the foregoing answer is true to his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true; that the grounds of his belief as to all matters not stated upon his knowledge are correspondence and other writings furnished to him by defendants and interviews with defendants; and that the reason why the verification is not made by defendants is that defendants are not residents of the State of New York.

DONALD B. ROSENBERG

Sworn to before me this

8th day of October, 1976.

JACK VOGEL
Notary Public, State of New York
No 41-4107326
Qualified in Queens County
Commission Expires March 30 1977

A-38

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Mildred Bargebuhr being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 508 East 87th Street, New York City

Check Applicable Box

☒ Affidavit of Service By Mail — On October 8, 1976 deponent served the within Answer to Amended Complaint upon Meehan & Fink, Esqs. attorney(s) for Plaintiffs in this action, at Route 17M, Box 391, Goshen, New York 10924 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on October 8, 1976

BONADIO
Notary Public, St
No. 60-3350430
Qualified in Westchester County
Commission Expires March 30, 1977

Mildred Bargebuhr
The name signed must be printed beneath

Mildred Bargebuhr

A-39

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a MEEHAN & FINK,	)	
Plaintiffs,	)	Civil Action #75-5891
- against -	)	
JOHN SNOW AND JUDY SNOW,	)	
Defendants.	)	

MOTION FOR JUDGMENT AGAINST THE
DEFENDANTS BY DEFAULT

Plaintiffs move the court for judgment against the defendants by default pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, for the reason that it has been more than ten (10) days since the Amended Complaint was served upon the defendants, and that no Answer has been served.

MEEHAN & FINK, ESQS.

By

A Member of the Firm
Attorneys Pro Se
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M - BOX 391
GOSHEN, NEW YORK 10924
(914) 294-5421

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before the Court at Room 607E,

A-40

United States Courthouse, Foley Square, City of New York, on the 27th day of October, 1976, at 10:00 in the forenoon of that day, or as soon thereafter as counsel can be heard.

MEEHAN & FINK, ESQS.

By

A Member of the Firm
Attorneys Pro Se
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN NEW YORK 10924
(914) 294-5421

A-41

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a MEEHAN & FINK, Plaintiffs,	)	AFFIDAVIT
- against -	)	Civil Action #75-5891
JOHN SNOW AND JUDY SNOW, Defendants.	)	

STATE OF NEW YORK)
COUNTY OF ORANGE) ss.:

ROBERT W. FINK, being duly sworn, deposes and says:

1. That deponent is one of the plaintiffs in the above entitled action and that deponent is personally familiar with the facts hereinafter set forth.

2. That this action was brought in the Supreme Court of the State of New York, Orange County, for moneys due and owing plaintiffs for legal services rendered. That the action was commenced on or about September 24, 1975 by service of a Summons with Notice. That defendants appeared by their attorneys, Ticktin, Malkin & Rosenberg, which firm has been succeeded by the firm of Vogel, Marks & Rosenberg, on or about October 15, 1975. That a Complaint was served on defendant's attorneys on or about October 24, 1975. That defendants requested and were granted three extensions of time to answer, up to and

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 301
GOSHEN NEW YORK 10924
(914) 294-5421

including December 19, 1975. That defendants removed the action to the United States District Court for the Southern District of New York on November 20, 1975. That Answer with Counterclaims was served by defendants on or about December 19, 1975. That plaintiffs requested and were granted an extension of time to reply to January 30, 1976. That plaintiffs' attorneys for defense of the Counterclaim, McLaughlin, Simone & Lawlor, upon information and belief, served a Reply on February 6, 1976, together with written Interrogatories. That, upon information and belief, the Answers to Interrogatories were never served by the defendants. That plaintiffs moved this court for leave to amend the Complaint, which motion was returnable on the 3rd day of May, 1976. That defendants requested and were granted two adjournments and that said motion came on before the court on June 24, 1976. That on August 26, 1976 the court rendered a Decision granting plaintiffs leave to amend the Complaint.

3. That on September 15, 1976 a copy of the Decision, with Notice of Entry, and the Amended Complaint, were duly served on defendants' attorneys, copies of which are annexed hereto and marked Exhibits A and B.

4. That defendants have failed to serve an Answer to the Amended Complaint, that no request for an extension of time to answer has been requested or granted, and that the defendants are now in default.

MEEHAN & FINK
ATTORNEYS AT LAW
WHITE LAKE PLAZA BOX 101
GOSHEN, NEW YORK 10924
(914) 294-5421

WHEREFORE, deponent respectfully moves the court for judgment against the defendants by default and that a determination of the damages be made, together with such other and further relief as they court may deem just and proper.

ROBERT W. FINK

Sworn to before me this
14th day of October, 1976.

Notary Public, Orange County,
My commission expires 3/30/78

MEEHAN & FINK
ATTORNEYS AT LAW
[illegible]
WOODBURY, NEW YORK 11797
(914) 264-5421

A-44

EXHIBIT A

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN, NEW YORK 10924
(914) 294-5421

A-45

Copy

U.S. DISTRICT COURT
FILED
AUG 26 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

MEEHAN & FINK, ESQS., :

Plaintiffs, :

- against - :

JOHN SNOW and JUDY SNOW, :

Defendants. :

- x

MEMORANDUM DECISION

75 Civ. 5891 (HFW)

4 5016

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

Plaintiffs, attorneys pro se, initiated this suit in Supreme Court, Orange County in September 1975 to collect fees allegedly owed them by the defendants for services rendered from December 1973 to September 1975. On petition of the defendants, in November 1975 the action was removed to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1446 (Supp. IV 1974). An answer was filed by the defendants on December 19, 1976 which contained several counter-claims charging the plaintiffs with, inter alia, negligence, carelessness, lack of skill and dereliction of professional responsibility.

In April 1976, plaintiffs made this motion (subsequently adjourned to June 24) for leave to amend the complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. They seek first to change the named plaintiffs to "John F. Meehan and Robert W. Fink, d/b/a Meehan & Fink," and to add a pro forma allegation of performance. Secondly, the plaintiffs seek to add two additional causes of action for defamation based upon slanderous statements allegedly made by the defendants.

While the defendants have consented to amending the complaint with respect to the correction of the name of the plaintiffs and to the adding of a pro forma allegation of performance, they have vigorously objected to the addition of the two causes of action for defamation.

Defendants set forth three arguments in opposing plaintiffs' motion:

1. The proposed amendments in question are wholly unrelated to the main thrust of the primary cause of action, and thus should not be adjudicated within the same proceeding.

2. The proposed amendments are mere retaliation against defendants' counter-claim, as demonstrated by the lack of evidentiary facts indicating the circumstances whereby the alleged slanderous remarks came to the plaintiffs' attention only as late as December 1975.

3. The defendants would be severely and irreparably prejudiced by the proposed amendments in that they would be forced to defend expanded claims not previously asserted by plaintiffs, with consequential costs and delays.

Rule 15 (a) of the Federal Rules of Civil Procedure states that a party may amend a pleading by leave of court or written consent of the adverse party where amendment as a matter of course is unavailable.[1] In determining whether to grant the plaintiffs' motion for leave to amend the complaint, the court must first consider the clause in Rule 15 (a) which states that "leave shall be freely given when justice so requires." The cases are in clear agreement that leave shall indeed be freely given in the absence of good reason to deny it. Foman v. Davis, 371 U.S. 178, 182 (1962); Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 287 (2d Cir. 1974); United States v. International Business Machines Corp., 66 F.R.D. 223, 228 (S.D.N.Y. 1975). In Foman v. Davis, supra at 182, the Supreme Court gave several examples of what such good reason for denial of leave to amend could be: undue

delay, bad faith or dilatory motive, repeated failure to cure deficiencies still existing despite previously allowed amendments, and undue prejudice to the opposing party.

Rule 15(a) implicitly requires that the amendment be sought in good faith, that it not be sought as a dilatory measure and that it not prejudice the other side. Billy Baxter, Inc v. Coca-Cola Co., 47 F.R.D. 345 (S.D.N.Y. 1969), aff'd, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971). Defendants' allegation that the plaintiffs are acting vindictively is conclusory and without factual support. It appears that the good faith requirement has been met in that the movants have made a prima facie showing of their ability to establish factual support for the new matters sought to be pleaded. The plaintiffs, in the proposed amended complaint, have alleged that defamatory remarks were made in front of named third persons by the defendants, words falsely spoken with the intent to damage plaintiff Meehan's reputation as an attorney. While the additional causes of action were not sought to be included as amendments until several months after the complaint had already been filed, plaintiffs assert that they did not become aware of the alleged defamatory statements until December 20, 1976, after the complaint and answer had both been filed. They further claim that they were not able to take action on this matter until several months later because of the natural reluctance of those people who had heard the alleged derogatory remarks to become involved. Consequently, there seems to be no dilatory motive on the part of plaintiffs in making this motion.

The factor of prejudice to the opposing party is the main consideration on which the courts have focused in considering motions for leave to amend pleadings. United States v. Hougham, 364 U.S. 310, 316 (1960); Strauss v. Douglas Aircraft Co., 404 F.2d 1152, 1155 (2d Cir. 1968); Middle Atlantic Utilities

Co. v. S.M.W. Development Corp., 392 F.2d 380, 384 (2d Cir. 1968). Defendants claim they will be prejudiced because they will have to defend against expanded claims and thus they will incur additional legal fees as a result of further discovery and may suffer delay in the trial of the action.

The defendant in Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra, made objections similar to those set forth by the defendants in the instant case. In that case, the defendant argued that the granting of leave to amend would necessitate additional expensive and time-consuming procedures such as additional discovery and more motions. The court, while granting the defendant summary judgment on other grounds, reversed the district court's denial of plaintiff's motion for leave to amend its complaint and noted that such prejudice was inadequate to sustain the denial of plaintiff's motion. Id. at 386.

The court in United States v. International Business Machines Corp., supra at 230, similarly held that prejudice such as additional discovery, resultant delay in going to trial, or increased complexity of litigation is not sufficient to defeat a motion for leave to amend a pleading. The court noted that, "/t/hose courts which have denied leave to amend on the ground of prejudice to the opposing party have focused their analysis on prejudice to that party's ability to litigate the merits of its case." Id.

The defendants have made no claims that their ability to litigate the merits of the case will be hampered if leave to amend is granted. Their claims that greater costs and additional time will be required do not demonstrate that their ability to litigate the merits of the case will be lessened. Furthermore, greater costs and time would be necessitated even if plaintiffs' motion was to be denied, since plaintiffs would then be required to bring their claims in a separate action.

Defendants' argument that the proposed causes of action are

unrelated to the primary action, standing alone, bears little weight, since courts have often granted leave to amend even where a new cause of action has been introduced in the absence of a showing of prejudice to the defendant. Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra; United States v. International Business Machines Corp., supra; Gomez v. Miller, 337 F. Supp. 386 (S.D.N.Y. 1971). Cases have also held that leave to amend a pleading may be granted even where completely new theories of relief are introduced as a result. Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273, 280 (S.D.N.Y. 1970); Dombrovskis v. Murff, 24 F.R.D. 302, 304 (S.D.N.Y. 1959). Furthermore, the allegedly slanderous statements in the instant case concern the services which plaintiffs had rendered and for which they are seeking payment. Thus there is some factual connection between the proposed amendments and the original complaint in any event.

Because the defendants have failed to demonstrate any good reason for the denial of the motion, plaintiffs' motion for leave to amend the complaint is granted.

The defendants have urged that if this court were to grant plaintiffs' motion, it do so only on the condition that plaintiffs file an undertaking to cover the costs incurred by defendants in responding to this motion, if plaintiffs are not sustained on the additional causes of action.

It is within this court's discretion to impose conditions when leave to amend a pleading is granted. Key Pharmaceuticals, Inc. v. Lowey, 54 F.R.D. 447 (S.D.N.Y. 1970); Maynard, Merel & Co v. Carcioppolo, supra at 280. Courts which have placed such conditions on grants of leave to amend pleadings generally have done so to offset the prejudice which would have otherwise resulted to the opposing party. As pointed out in 3 J. Moore, Federal Practice para. 15.08[6], at 935 (2d ed.

1974), "possible prejudice which might otherwise result from granting leave to amend may be avoided or minimized" by imposing terms on the granting of leave.

In Shelley v. The Maccabees, 26 F.R.D. 10 (S.D.N.Y. 1960), the court granted defendant insurance company's motion to amend its answer by adding additional affirmative defenses to its answer. The court, however, imposed the condition that the defendant would have to restore certain rights which plaintiff policy holder had at the time the original answer had been filed, but which had been lost by the time the motion for leave to amend was made. Thus, the condition was imposed to neutralize the prejudice to plaintiff which otherwise would have occurred by the plaintiff's reliance on the original answer.

There is no comparable showing of prejudice in the instant case, nor does there seem to be any need for imposing any conditions on the granting of plaintiffs' motion. The expenditure of additional costs required by plaintiffs' amendment is not sufficiently prejudicial to defendants to warrant the imposition of any terms, particularly in view of the fact that such costs would be incurred regardless if plaintiffs were to initiate a separate defamation action.

The plaintiffs' motion for leave to amend the complaint is granted, without costs.

SO ORDERED.

DATED: New York, New York

August 25, 1976

Henry F. Werker

U. S. D. J.

[illegible]

the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ Attorney's affirmation — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's verification by affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

affirm that the foregoing statements are true under penalties of perjury.

ated: .....
(Print signer's name below signature)

TATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

belief, as to those matters therein not stated upon knowledge, is based upon the following:

worn to before me on , 19

.....
(Print signer's name below signature)

.....

TATE OF NEW YORK, COUNTY OF ORANGE ss:

JEAN KAMINSKI being sworn says: I am not a party to the action, am over 18 years of

ge and reside at Chester, New York

On September 15, 1976, I served a true copy of the annexed Memorandum Decision with Notice of Entry in the following manner:

☒ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Vogel, Marks & Rosenberg, Esqs.
477 Madison Avenue
New York, New York 10022

Attention: Donald B. Rosenberg, Esq.

McLaughlin, Simone & Lawlor, Esqs.
80 John Street
New York, New York 10038

Attention: James A. Magee, Esq.

sworn to before me on September 17, 1976

Jean Kaminski
(Print signer's name below signature)
JEAN KAMINSKI

ROBERT W. FINK
NOTARY PUBLIC-STATE OF NEW YORK
APPOINTED ORANGE COUNTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A-52

MEEHAN & FINK, ESQS.

Plaintiffs,

- against -

JOHN SNOW and JUDY SNOW,

Defendants.

MEMORANDUM DECISION

MEEHAN & FINK

Attorneys for pro se

GOSHEN, NEW YORK 10924
(914) 294-5421

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated: .....

Attorney(s) for

PLEASE TAKE NOTICE

☒ NOTICE OF ENTRY *that the within is a (certified) true copy of a* Memorandum Decision *entered in the office of the clerk of the within named court on* August 26 *19* 76

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on 19 , at M.*

Dated: September 15, 1976

MEEHAN & FINK

Attorneys for pro se

GOSHEN, NEW YORK 10924

To:

Attorney(s) for

N 912 CL

COPYRIGHT 1973 BY ALL STATE LEGAL SUPPLY
300 SHEFFIELD STREET MOUNTAINSIDE, N.J.

A-53

EXHIBIT B

MEEHAN & FINK

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a MEEHAN & FINK, Plaintiffs,	AMENDED COMPLAINT
- against -	Civil Action; File #75-5891
JOHN SNOW AND JUDY SNOW, Defendants.	

Plaintiffs, for their claim for relief against the defendants, respectfully allege:

AS A FIRST CAUSE OF ACTION IN BEHALF
OF JOHN F. MEEHAN AND ROBERT W. FINK
AGAINST JOHN SNOW AND JUDY SNOW

1. That this action was commenced against the defendants in the Supreme Court of the State of New York, Orange County, and removed to the United States District Court for the Southern District of New York by Petition of the defendants filed on the 20th day of November, 1975, upon the ground that the controversy between the plaintiffs and defendants is founded on diversity of citizenship and amount. Plaintiffs are citizens of the State of New York, residing and doing business in the County of Orange, and defendants are citizens of the State of Pennsylvania, residing at Carlisle, Pennsylvania. The matter in controversy exceeds, exclusive of interest and cost, the sum of TEN THOUSAND ($10,000.00) DOLLARS.

2. That the transactions complained of arose from the transaction of business by the defendants in the State of New York.

3. That at all times hereinafter mentioned, plaintiffs were and continue to be attorneys and counsellors at law, duly licensed and admitted to practice in the State of New York, with a place of business in the Town of Goshen, County of Orange, State of New York.

4. That plaintiffs formed a partnership on or about January, 1975, that at all times hereinafter mentioned consisted of John F. Meehan and Robert W. Fink, with a place of business located at Route 17M, Goshen, New York, and that the moneys due plaintiff or plaintiffs for professional services rendered and disbursements expended are an account due the partnership.

5. That between the dates of December, 1973 and September, 1975, plaintiff or plaintiffs performed professional services for defendants, at their instance and request.

6. That the defendants agreed to pay plaintiffs the reasonable value of their services together with disbursements necessarily incurred.

7. That plaintiff or plaintiffs necessarily expended approximately 33.75 hours in defendants' behalf in the matter of applications before the Planning Board, Town of Goshen, County of Orange, New York, and an Article 78 proceeding thereafter, brought before the Supreme Court, County of Orange, New York. That the fair and reasonable value of said services is $75 per hour, and that no part has been paid, although duly demanded.

8. That plaintiff or plaintiffs necessarily expended approximately 51.7 hours in defendants' behalf in the matter of the defense of

A-56

a suit for commissions brought against defendant Judy D. Snow in the Supreme Court, County of Orange, New York. That the fair and reasonable value for said services is $50 per hour, and that no part has been paid, although duly demanded.

9. That the plaintiff or plaintiffs necessarily expended approximately 182.9 hours in defendants' behalf in prosecution of a mortgage foreclosure action, brought in the Supreme Court, County of Orange, New York. That the fair and reasonable value of said services is $50 per hour and that to date only $32.99 has been paid, although the total sum has bee demanded.

10. That the plaintiff or plaintiffs necessarily incurred $279.85 in disbursements in the aforementioned matters, and that $191.60 has been paid, although the total sum has been duly demanded.

11. That plaintiffs duly performed all terms and conditions of their agreements with the defendants.

12. That due to the aforesaid, plaintiffs demand judgment against the defendants as hereinafter set forth.

AS A SECOND CAUSE OF ACTION IN BEHALF OF
JOHN F. MEEHAN AGAINST JUDY SNOW

13. Plaintiff John F. Meehan repeats, reiterates and realleg each and every allegation in paragraphs of the Complaint designated "1" through "11" as though more fully set forth herein.

14. That commencing 1950 plaintiff John F. Meehan has and co tinues to practice law in the State of New York, with a place of business located in the Town of Goshen.

15. That at all times, plaintiff John F. Meehan has borne a good reputation for integrity and professional competence in said Town ar in and about Orange County and surrounding counties.

16. That heretofore and on or about the 28th day of July, 19 defendant Judy Snow, while in the presence of James Mari and Helen Mari i the Town of Chester, County of Orange, State of New York, and referring t John Meehan's work in behalf of Judy Snow and John Snow, stated: that "He is incompetent", that "He messed up the sale of the house property to the owner of the Montgomery Nursing Home", that "We lost $100,000 because of John Meehan", that "He really screwed everything up", and that "He goofed everything up".

17. That the words so spoken were false and defamatory, were known to the defendant Judy Snow to be false and defamatory, and were spoken recklessly, carelessly, willfully and maliciously and with intent to damage plaintiff's good name and reputation as an attorney.

18. That by reason of the words so spoken by the defendant Judy Snow, the plaintiff John F. Meehan has been injured in his good nar and credit as an attorney and said words have and will cast a strong sti ma upon his standing as an attorney in the Town of Goshen, County of Ora and surrounding counties, and will work greatly to his injury in obtaini clients and to his practice in the future, all to his damage in the sum FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

19. That due to the aforesaid, plaintiff John F. Meehan demands judgment against the defendant Judy D. Snow as hereinafter set for

AS A THIRD CAUSE OF ACTION IN
BEHALF OF JOHN MEEHAN AGAINST JOHN SNOW

20. Plaintiff John F. Meehan repeats, reiterates and realleges each and every allegation contained in paragraphs of the Complaint designated "1" through "16" as more fully set forth herein.

21. That heretofore and on or about the 7th day of October, 1975, the defendant John Snow, while in the presence of Martyn Taub, Esq. and Arthur Kabinoff in the Village of Suffern, Town of Ramapo, County of Rockland, State of New York, and referring to John Meehan's work in behal of John Snow and his wife, Judy Snow, stated: that "When John should hav been doing the job he was probably out playing golf", that "When he shoul have been doing the job, John told me he was out of town with his wife", that "He was probably out drinking because he sounded like he didn't know what he was talking about whenever I spoke with him", and "Whenever I spo with John he sounded like he was drinking; he didn't seem to remember fro one time to the next what he said."

22. That the words so spoken were false and defamatory, were known to the defendant John Snow to be false and defamatory, and were spoken recklessly, carelessly, willfully and maliciously and with intent to damage plaintiff's good name and reputation as an attorney.

23. That by reason of the words so spoken by the defendant Joh Snow, the plaintiff John F. Meehan has been injured in his good name and credit as an attorney and said words have and will cast a strong stigma upon his standing as an attorney in the Town of Goshen, County of Orange,

A-59

and surrounding counties, and will work greatly to his injury in obtaining clients and to his practice in the future, all to his damage in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

WHEREFORE plaintiffs demand judgment as follows:

1. For plaintiffs John F. Meehan and Robert W. Fink against John Snow and Judy Snow on the first cause of action in the sum of FOURTEEN THOUSAND THREE HUNDRED SIXTEEN DOLLARS FIFTY ONE CENTS ($14,316.51);

2. For plaintiff John F. Meehan against Judy Snow on the second cause of action in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS:

3. For plaintiff John F. Meehan against John Snow on the third cause of action in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS:

4. For plaintiff John F. Meehan against John Snow and Judy Snow the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS as exemplary and punitive damages;

5. For interest, costs and disbursements; and

6. For such other and further relief as to the court may seem just and proper.

MEEHAN & FINK, ESQS.

By _____

A member of the firm
Attorneys Pro Se
Office & P. O. Address
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

A-60

STATE OF NEW YORK, COUNTY OF ss:

, the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated: (Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19 (Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ORANGE ss:

JEAN KAMINSKI being sworn says: I am not a party to the action, am over 18 years of age and reside at Chester, New York

On September 15, 19 76, I served a true copy of the annexed Amended Complaint in the following manner:

☒ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Vogel, Marks & Rosenberg, Esqs.
477 Madison Avenue
New York, New York 10022
Attention: Donald B. Rosenberg, Esq.

McLaughlin, Simone & Lawlor, Esqs.
80 John Street
New York, New York 10038
Attention: James A. Magee, Esq.

Sworn to before me on September 17, 19 76

Jean Kaminski
(Print signer's name below signature)
JEAN KAMINSKI

[H-6]

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK,
d/b/a MEEHAN & FINK,

Plaintiffs,

-against-

JOHN SNOW AND JUDY SNOW,

Defendants.

AFFIRMATION IN OPPOSITION

Index No. 75 Civ 5891 (HFW)

DONALD B. ROSENBERG, being an attorney at law, under penalty of perjury, hereby affirms as follows:

1. That your affirmant is a member of the firm of VOGEL MARKS & ROSENBERG, attorneys for the defendant in the above action, and am fully familiar with the facts hereinafter set forth.

2. Your affirmant, with considerable embarrassment and regret, apologizes to this Court and admits candidly that the defendant's answer to the amended complaint was not served upon the plaintiffs until October 8, 1976 as set forth on a copy of the affidavit of service by mail annexed hereto.

3. Your affirmant, in the flow of his hectic practice, confused federal court practice with New York State practice by assuming that an answer to an amended complaint may be served within twenty days of service (twenty-three (23) days if the

amended complaint is served by mail, as it was) and not the ten day period as set forth in federal practice.

4. Your affirmant is essentially a state court practitioner and overlooked the difference between the rules involved. However, we are here dealing with a period of default of approximately ten days which in no way prejudices plaintiff. This was a ministerial error on the part of your affirmant. The court in its discretion may certainly overlook the default of such short duration and allow service and filing of the answer to the amended complaint. There are issues here of great gravity, involving substantial sums of money. Certainly, the preferred disposition of this case should be on its merits and not by default judgment, particularly in light of the circumstances and time frame of the default in pleading. Gomes v. Williams (C.A. 10th 1970) 420 F2d 1364.

5. The numerous cases cited in 6 Moore's Federal Practice, 2nd Edition, Section 55.10[2] amply support the court's wide discretion in opening a default in similar cases. Here, however, no default judgment has been entered.

6. No wilfullness on the part of defendants nor prejudice to plaintiffs have been alleged in the moving papers causing or resulting from the default.

7. Defendants have a good and meritorious defense and counterclaim against plaintiffs as more fully set forth in the answer and proposed answer to the amended complaint, a copy of which is annexed hereto.

8. In 6 Moore's Federal Practice, Section 55.05[2], it was stated:

> "The grant or denial of a motion for the entry by the court of a default judgment lies within the sound discretion of the trial court. This proposition is supported by good sense. And its soundness is also demonstrable by reference to Rule 55(c), which authorizes the trial court to set aside an entry of default on a showing of good cause.
>
> The court, in exercising its discretion, may properly consider such factors as the following: whether the defendant's failure to plead or otherwise defend is largely technical; whether the plaintiff will be prejudiced, and, if so, the extent thereof; whether the entry of the default judgment would result in injustice."

Accordingly, your affirmant respectfully requests that the court deny the motion in all respects and grants leave to defendants to serve and file their answer to the amended complaint.

DONALD B. ROSENBERG

A-64

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Mildred Bargebuhr being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at New York City

Check Applicable Box

☐ Affidavit of Service By Mail On October 26, 19 76 deponent served the within Affirmation in Opposition upon Meehan & Fink, Esqs. attorney(s) for Plaintiffs in this action, at Route 17M, Box 391, Goshen, New York 10924 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — ~~a post-office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on October 26, 19 76

DONALD B. ROSENBERG
Notary Public, State of New York
No. 60-3350430
Qualified in Westchester County
Commission Expires March 30, 1977

.....
The name signed must be printed beneath
Mildred Bargebuhr

[A-65]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN F. MEEHAN AND ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs,

AFFIDAVIT IN REPLY

- against -

Index #75 CIV 5891

JOHN SNOW AND JUDY SNOW,

Defendants.

----------x

STATE OF NEW YORK)
COUNTY OF ORANGE) ss.:

ROBERT W. FINK, being duly sworn, deposes and says:

1. That deponent is one of the plaintiffs in the above entitledaction, and that deponent is personally familiar with the facts hereinafter set forth.

2. That on October 15, 1976, subsequent to service of the motion for a Default Judgment, deponent received the Answer to the Amended Complaint, annexed hereto and marked Exhibit A, and that said Answer was rejected as untimely.

3. That while the Affidavit of Mailing of the Answer states that it was mailed on October 8, 1976, the postmark on the envelope in which the Answer was sent is dated October 14, 1976, a copy of which is annexed hereto and marked Exhibit B.

4. That due to the default of the defendants, the burden of showing a reasonable cause for default and setting forth a meritorious defense, or claim, exists.

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN, NEW YORK 10924
(914) 294-5421

5. That while plaintiffs cannot take serious issue with Mr. Rosenberg's excuse for the default, the same does not hold true for the defendants' showing of a meritorious defense or claim.

6. That the court's attention is respectfully directed to the history of this action as set forth in paragraph 2 of deponent's Affidavit sworn to on October 14, 1976. That as can be seen, from the inception of this suit more than one year ago, the defendants have done no more than attempt to delay the action.

7. That in paragraph 7 of his Affirmation (undated), Mr. Rosenberg states: "Defendants have a good and meritorious defense and counterclaim against plaintiffs as more fully set forth in the answer and proposed answer to the amended complaint, a copy of which is annexed hereto."

8. That it is respectfully noted that Mr. Rosenberg signed the Answer to the Amended Complaint (and Answer). That because Mr. Rosenberg was retained subsequent to any of the transactions complained of, and because no discovery proceedings have been demanded by Mr. Rosenberg, it can only be concluded that Mr. Rosenberg's knowledge is based solely upon hearsay.

9. That an examination of the Answer, a copy of which is annexed hereto and marked Exhibit C, and Answer to the Amended Complaint, Exhibit A, shows that defendants have set forth every stock affirmative defense in the form book, and accused plaintiffs, inter alia, of negligence, carelessness,

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 191
GOSHEN, NEW YORK 10924
(914) 294-5421

unskillfullness, dereliction of professional responsibility, violation of the standard of professional conduct and acting willfully in conflict of the defendants' interests, all of which have amounted to alleged damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND ($1,500,000.00) DOLLARS.

10. That not one accusation is supported by a single concrete statement of fact. That when called upon to support those accusations in a Demand for Interrogatories, upon information and belief, served upon defendants on February 6, 1976, a copy of which is annexed hereto and marked Exhibit D, defendants failed to serve an Answer.

11. That the facts are that the work for which plaintiffs were retained was accomplished: the work before the Zoning Board was terminated at defendants' request; the work in behalf of defendants in defending them against a broker's suit for commissions was accomplished by having the Complaint dismissed by summary judgment; the work in foreclosing upon a mortgage held by the defendants was accomplished after a conflict with the mortgagor, (an attorney) that was in the Appellate Division twice, and the property was retaken by the defendants and sold.

12. That due to the defendants' failure in setting forth a meritorious claim or defense, deponent prays for an Order granting Judgment by default against the defendants, judgment in the amount of FOURTEEN THOUSAND THREE HUNDRED SIXTEEN DOLLARS FIFTEEN CENTS ($14,316.15) on plaintiffs' first cause of action, and setting a hearing to determine the damages due the plaintiff

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN, NEW YORK 10924
(914) 294-5421

IA-68

John F. Meehan upon the second and third causes of action.

ROBERT W. FINK

Sworn to before me this

2nd day of November, 1976.

Notary Public,

DALE K. DeVRIES
NOTARY PUBLIC, State of New York
Appointed in Orange County
Commission Expires March 30, 1978

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 191
GOSHEN, NEW YORK 10924
(914) 294-5421

A-69

EXHIBIT A

MEEHAN & FINK
ATTORNEYS AT LAW
[illegible]
[illegible] NEW YORK [illegible]
(914) 294-5421

A-70

JOHN F. MEEHAN

RECEIVED
OCT 15 1976

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a/
MEEHAN & FINK

Plaintiffs,

-against-

JOHN SNOW and JUDY SNOW,

Defendants.

ANSWER TO
AMENDED COMPLAINT

Index No. 75 CIV5891

Defendants, by their attorneys, VOGEL MARKS & ROSENBERG, as successor to TICKTIN MALKIN & ROSENBERG a dissolved law partnership, as and for their answer to the amended complaint, hereby allege as follows:

1. Admits the allegations in the paragraphs of the Complaint numbered "1", "2", "5" and "6".

2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs of the Complaint numbered "3" and "14".

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of the Complaint numbered "4", except denies there are any monies due plaintiff or plaintiffs for professional services rendered and disbursements expended.

4. Denies each and every allegation contained in paragraphs of the Complaint numbered "7", "8", "9", "11", "15", "16", "17", "18", "21", "22" and "23".

5. Denies the allegations of paragraph numbered "10" of the Complaint, except admits that ONE HUNDRED AND NINETY-ONE DOLLARS AND SIXTY CENTS ($191.60) has been paid.

6. Repeats, reiterates and realleges each and every admission allegation and denial contained in paragraphs "1" through "5" of this answer insofar as they relate to the allegations in the paragraphs of the Complaint numbered "13" and "20".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

7. This Court lacks jurisdiction over the subject matter of the claim against defendants.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

8. This Court lacks jurisdiction over the persons of the defendants.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

9. The Complaint fails to state a claim against defendants upon which relief may be granted.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

10. Defendants deny that the work, labor, and services alleged in plaintiffs' complaint herein, to have been performed for defendants by plaintiffs, were of the fair and reasonable value of FOURTEEN THOUSAND THREE HUNDRED AND SIXTEEN DOLLARS AND SIXTY-ONE CENTS ($14,316.61).

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

11. The plaintiffs herein have no legal capacity to sue and cannot maintain this action in that they are not the real party in interest.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

12. This action is barred by the doctrine of laches.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

13. Plaintiffs have no legal capacity to sue and cannot maintain this action.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

14. Plaintiffs cannot maintain this action and have no legal capacity to sue in that they are not the real party in interest.

A-73

AS AND FOR A NINTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

15. Plaintiffs had a generally bad reputation at the time the words complained of were allegedly spoken by defendants.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE AND AS
AND FOR A COUNTERCLAIM AGAINST PLAINTIFFS:

16. At all times hereinafter mentioned defendants are and were residents of the State of Pennsylvania.

17. At all times hereinafter mentioned plaintiffs were and still are attorneys and counsellors-at-law, duly licensed admitte as such having offices at Route 17M, Goshen, New York.

18. In or about May, 1973, defendants retained the services of JOHN MEEHAN, ESQ., as attorney to represent defendants in certain matters including, but not limited to, the negotiation a sale of defendants' residence in Goshen, New York.

19. Plaintiff, JOHN MEEHAN, thereafter accepted said retain and employment as the attorney for defendants and undertook the total representation of defendants in the aforesaid matter in a proper, skillful and professional and diligent manner.

20. Defendants fully and fairly stated to plaintiff JOHN MEEHAN, ESQ., the facts constituting the circumstances relating to the sale of defendants' aforesaid residence.

21. Plaintiff, JOHN MEEHAN, thereafter formed a partnership with one ROBERT W. FINK, both of whom are plaintiffs in the withi action and who continued the representation of defendants in the varied services required to prosecute a foreclosure claim and subsequent resistance to the vacating of a judgment of foreclosu and sale as a result of a default by JOHN TOMICKI, the original contract purchaser of defendants' residence in Goshen, New York.

22. Notwithstanding plaintiffs' professional responsibility to diligently, competently and professionally render legal servi to defendants in the aforesaid matter, plaintiffs have wholly failed to exercise their responsibility to defendants in that th failed to protect the rights of defendants as mortgagees and sellers of said residence, negligently, carelessly and unskillfu advised and induced defendants to accomodate unreasonable reques by the said JOHN TOMICKI, failed to advise defendants of all tra actions having relevance to the aforesaid matters, in that plaintiffs acted in an unprofessional manner and in dereliction of their professional responsibility to defendants in violation of their retainer by failing to protect the interests of defendants and causing certain conditions which resulted in prejud to defendants' interests all of which are in violation of the standard of professional conduct for which plaintiffs were charg in rendering services on defendants' matters as aforesaid.

23. Solely by reason of the foregoing negligence of plaintiffs, defendants have been damaged in the sum of FIVE HUNDR THOUSAND ($500,000.00) DOLLARS.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE
AND SECOND COUNTERCLAIM AGAINST PLAINTIFFS:

24. Defendants repeat and reallege paragraphs numbered "10" through "22" inclusive, as if same were more fully set forth here in.

25. Plaintiffs contracted with the defendants as part of the agreement of retainer, to perform services on behalf of defendan in a professional and skilled manner.

26. By failing to provide said services in furtherance of said retainer agreement and in otherwise acting in an unprofessi manner in violation of said retainer agreement, plaintiffs breac their aforesaid agreement and contract with defendants.

27. Solely by reason of the foregoing breach of contract by plaintiffs, defendants have been damaged in the sum of FIVE HUND THOUSAND ($500,000.00) DOLLARS.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
AND THIRD COUNTERCLAIM AGAINST PLAINTIFFS:

28. Defendants repeat and reallege paragraphs numbered "10" through "22" as if more fully set forth herein.

29. Plaintiffs in certain respects, acted wilfully in confli of interest with respect to certain transactions between plaintif and each of them and JOHN TOMICKI in prejudice of defendants' rights, which conflict of interest was known to plaintiffs and upon which they acted adverse to defendants' interests.

30. By reason of the foregoing acts of plaintiffs and their failure to act, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

WHEREFORE, defendants demand judgment dismissing the complain costs and disbursements in defending this action, including reason able attorneys' fees and for judgment against plaintiffs, joint and several, on defendants' counterclaims in the total cumulative sum of ONE MILLION FIVE HUNDRED THOUSAND ($1,500,000.00) DOLLARS with interest together with costs and disbursements.

VOGEL MARKS & ROSENBERG
As successor to Ticktin Malkin
& Rosenberg, a dissolved law
partnership

By: Donald B. Rosenberg
A Member of the Firm
Attorneys for Defendants
477 Madison Avenue
New York, N. Y. 10022
(212) 758-3404

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DONALD B. ROSENBERG, being duly sworn, deposes and says, that he is a member of the firm of VOGEL MARKS & ROSENBERG, attorneys

for defendants in this action and that the foregoing answer is true to his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true; that the grounds of his belief as to all matters not stated upon his knowledge are correspondence and other writing furnished to him by defendants and interviews with defendants; and that the reason why the verification is not made by defendants is that defendants are not residents of the State of New York.

DONALD B. ROSENBERG

Sworn to before me this

8th day of October, 1976.

JACK VOGEL
Notary Public, State of New York
No. 41-4107326
Qualified in Queens County
Commission Expires March 30, 1977

A-78

EXHIBIT B

EEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
OSHEN, NEW YORK 10924
(914) 294-5421

A-79

BRONX, NY 10451
OCT 14
6 AM

GIVE -
MENTAL
HEALTH
FUND

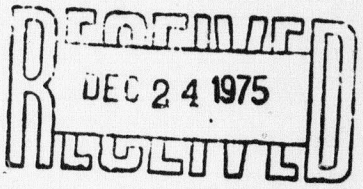
A-80

EXHIBIT C

MEEHAN & FINK
ATTORNEYS AT LAW
[illegible]
[illegible]
(914) 294-5421

A-81

JOHN F. MELMAN



UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

MILLER LINK, ESQ.,

Plaintiff,

-against-

JOHN SNOW and JUDY SNOW,

Defendants.

VERIFIED ANSWER

Index No. 75 CIV 5891

Defendants, by their attorneys, TICKTIN MALKIN & ROSENBERG, answer the complaint herein as follows:

1. Admits the allegations of the paragraphs of the Complaint numbered "3", "5", and "6".

2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph of the Complaint numbered "1".

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the Complaint numbered "2", except denies that there are any monies due plaintiff or plaintiffs for professional services rendered and disbursements expended.

4. Denies the allegations of paragraph "4" of the Complaint except admits that certain of the transactions complained of occured in the State of New York, County of Orange.

5. Denies the allegations of paragraph numbered "10" of the Complaint, except admit that ONE HUNDRED AND NINETY-ONE DOLLARS AND SIXTY CENTS ($191.60) has been paid.

6. Denies the allegations of the paragraphs of the Complaint numbered "7", "8", and "9".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

7. This Court lacks jurisdiction over the subject matter of the claim against defendants.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

8. This Court lacks jurisdiction over the persons of the defendants.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

9. The Complaint fails to state a claim against defendants upon which relief may be granted.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

10. Defendants deny that the work, labor, and services alleged in plaintiffs' complaint herein, to have been performed for defendants by plaintiffs, were of the fair and reasonable value of FOURTEEN THOUSAND THREE HUNDRED AND SIXTEEN DOLLARS AND SIXTY-ONE CENTS ($14,316.61).

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

11. The plaintiffs herein have no legal capacity to sue and cannot maintain this action in that they are not the real party in interest.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
AND AS AND FOR A COUNTERCLAIM AGAINST PLAINTIFFS:

12. At all times hereinafter mentioned defendants are and were residents of the State of Pennsylvania.

13. At all times hereinafter mentioned plaintiffs were and still are attorneys and counsellors-at-law, duly licensed admitted as such having offices at Route 17M, Goshen, New York.

14. In or about May, 1973, defendants retained the services of JOHN MEEHAN, ESQ., as attorney to represent defendants in certain matters including, but not limited to, the negotiation and sale of defendants' residence in Goshen, New York.

15. Plaintiff, JOHN MEEHAN, thereafter accepted said retainer and employment as the attorney for defendants and undertook the total representation of defendants in the aforesaid matter in a proper, skillful and professional and diligent manner.

16. Defendants fully and fairly stated to plaintiff, JOHN MEEHAN, ESQ., the facts constituting the circumstances relating to the sale of defendants' aforesaid residence.

17. Plaintiff, JOHN MEEHAN, thereafter formed a partnership with one ROBERT W. FINK, both of whom are plaintiffs in the within action and who continued the representation of defendants in the varied services required to prosecute a foreclosure claim and subsequent resistance to the vacating of a judgment of foreclosure and sale as a result of default

by JOHN TOMICKI, the original contract purchaser of defendants' residence in Goshen, New York.

18. Notwithstanding plaintiffs' professional responsibility to diligently, competently and professionally render legal services to defendants in the aforesaid matter, plaintiffs have wholly failed to exercise their responsibility to defendants in that they failed to protect the rights of defendants as mortgagees and sellers of said residence, negligently, carelessly and unskillfully advised and induced defendants to accomodate unreasonable requests by the said JOHN TOMICKI, failed to advise defendants of all transactions having relevance to the aforesaid matters, in that plaintiffs acted in an unprofessional manner and in dereliction of their professional responsibility to defendants in violation of their retainer by failing to protect the interests of defendants and causing certain conditions which resulted in prejudice to defendants' interests all of which are in violation of the standard of professional conduct for which plaintiffs were charged in rendering services on defendants' matters as aforesaid.

19. Solely by reason of the foregoing negligence of plaintiffs, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE AND SECOND COUNTERCLAIM AGAINST PLAINTIFFS:

20. Defendants repeat and reallege paragraphs numbered "12" through "18" inclusive, as if same were more fully set forth herein.

21. Plaintiffs contracted with the defendants as part of the agreement of retainer, to perform services on behalf of defendants in a professional and skilled manner.

22. By failing to provide said services in furtherance of said retainer agreement and in otherwise acting in an unprofessional manner in violation of said retainer agreement, plaintiffs breached their aforesaid agreement and contract with defendants.

23. Solely by reason of the foregoing breach of contract by plaintiffs, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE AND THIRD COUNTERCLAIM AGAINST PLAINTIFFS:

24. Defendants repeat and reallege paragraphs numbered "12" through "18" as if more fully set forth herein.

25. Plaintiffs in certain respects, acted wilfully in conflict of interest with respect to certain transactions between plaintiffs and each of them and JOHN TOMICKI in prejudice of defendants' rights, which conflict of interest was known to plaintiffs and upon which they acted adverse to defendants' interests.

26. By reason of the foregoing acts of plaintiffs and their failure to act, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

WHEREFORE, defendants demand judgment dismissing the complaint, costs and disbursements in defending this action, including reasonable attorneys' fees and for judgment against plaintiffs, joint and several, on defendants' counterclaims in the total cumulative sum of ONE MILLION FIVE HUNDRED THOUSAND ($1,500,000.00) DOLLARS with interest together with costs and disbursements.

TICKTIN MALKIN & ROSENBERG

By: /s/ DONALD B. ROSENBERG
A Member of the Firm
Attorneys for Defendants
477 Madison Avenue
New York, N.Y. 10022
(212) 758-3404

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DONALD B. ROSENBERG, being duly sworn, deposes and says, that he is a member of the firm of TICKTIN MALKIN & ROSENBERG, attorneys for defendants in this action and that the foregoing answer is true to his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true; that the grounds of his belief as to all matters not stated upon his knowledge are correspondence and other writings furnished to him by defendants and interviews with defendants; and that the reason why the verification is not made by defendants is that defendants are not residents of the State of New York.

/s/
DONALD B. ROSENBERG

Sworn to before me this
10th day of December, 1975.

A-87

EXHIBIT D

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE [illegible]
[illegible], NEW YORK [illegible]
[illegible]

B-86

Admirtec
B 964 34
111 RLR
1503

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- -*

MEEHAN & FINK, ESQS.

Plaintiffs,

CIVIL ACTION FILE
NO. 75 CIV 5891

-against-

JOHN SNOW and JUDY SNOW,

Defendants.

- -*

Interrogatories propounded by the plaintiffs, defendants on the counterclaim pursuant to Rule 33, Federal Rules of Civil Practice to be answered under oath, separately and fully in writing by the defendants-plaintiffs on the counterclaim:

1. State your full name, age and place of birth.

2. Have you ever been known by any other name and if so, give the other name or names, and state where and when you used such names.

3. Have your names ever been legally changed, and if so, state when, where and through what procedure.

4. State your present residence address and the period during which you have resided at said address.

5. List all other addresses at which you have resided during the past ten years and the dates of the use of each.

6. Are you married at the present time, and if so,
   (a) give your spouse's full name.
   (b) if a female, her maiden name.
   (c) his or her address for the five years before your marriage.
   (d) the date and place of your marriage.
   (e) state whether or not your spouse is now living with you.
   (f) if not, your spouse's present address.

7. State whether you have made any statement or statements in any form to any person regarding any of the events or happenings referred to in your complaint, and if so, state:
   (a) the name and address of the person or persons to whom such statements were made.

8. State the full name and last known address, giving the street, street number, city and state of every witness known to you or to your attorneys who has any knowledge regarding the facts and circumstances surrounding the happening of the incident referred to in the complaint or your alleged damages including, but not being limited to, eyewitnesses to such event, and other persons having any knowledge thereof.

9. If any of the witnesses listed above or whom you propose to use at the trial are related to you or to each other, pleas state the nature of such relationship.

10. State the full name and last known address giving the street, street number, city and state of every witness known to you or to your attorneys who claim to have seen or heard the defendant make any statement or statements pertaining to any of the events or happenings alleged in your complaint.

11. Supply the following information with respect to each individual whose name you have given in the answer to the preceding interrogatory:
    (a) the location or locations where the defendants made any such statement or statements.
    (b) the name and address of the person or persons in whose presence the defendants made any such statement or statements.
    (c) the time and date upon which the defendants made any such statement or statements.
    (d) the full name and address of any other person who was present at the time and place the defendants made such statement or statements.
    (e) Whether you or anyone acting on your behalf obtained statements in any form from any persons who claim to be able to testify to the statement or statements made by the defendants.

12. If the answer to paragraph (e) above is in the affirmative, then state:
    (a) the names and addresses of the persons from whom any such statements were taken.
    (b) the date upon which said statements were taken.
    (c) the names and addresses of the employers of the persons who took such statements.
    (d) the names and addresses of the persons having custody of such statements.
    (e) whether such statements were written, oral recording device or by court reporter or stenographer.

13. State whether you, your attorney, your insurance carrier or anyone acting on your behalf obtained statements in any form from any persons regarding any of the events or happenings that occurred relating to the incident referred to in the complaint immediately before, at the time of, or immediately after said incident, and if so, state:

(a) the name and address of the person from whom any such statements were taken.
(b) the dates on which such statements were taken.
(c) the names and addresses of the persons and employers of such persons who took such statements.
(d) the namesand addresses of the persons having custody of such statements.
(e) whether such statements were written, by recording device, by court reporter or stenographer.

14. State the names and addresses of any and all proposed expert witnesses, and the technical files in which you claim they are an expert.

15. Please state in detail the nature of the damages you allege that you suffered as a result of the incident referred to in the complaint.

16. Have you ever been involved in any other legal action, either as a defendant or as a plaintiff? If so, state:
(a) the date and place each such action was filed, giving the name of the court, the name of the other party or parties involved, the number of such actions and the names of the attorneys representing each party.
(b) a description of the nature of each such action.
(c) the result of each such action, whether or not there was an appeal and the result of the appeal and whether or not such case was reported, and the name, volume number and page citation of such report.

17. State whether the retainer agreement referred to in the counterclaim of the defendants-plaintiffs on the counterclaim was oral or in writing; if oral state the substance and all pertinent details thereof; if in writing set forth a true and exact copy thereof; state the date and/or dates when said retainer agreement and/or contract was

allegedly made and identify the party or parties who made such and entered into said agreement on behalf of the plaintiffs-defendants on the counterclaim and on behalf of defendants-plaintiffs on the counterclaim; state how it is alleged these answering parties, their agents, servants and/or employees allegedly breached any such agreement and/or contract.

18. State how it is alleged these answering parties represented the defendants-plaintiffs on the counterclaim in the negotiation and sale of their residence in Goshen, New York; state and describe the acts which allegedly constituted the negotiation and sale of defendants' residence allegedly done by these answering parties, describe in whose presence said acts were done, the date that said acts and the party or parties involved in said acts.

19. Describe where the aforesaid acts allegedly took place.

20. State how it is alleged these answering parties "undertook the total representation of defendants in the aforesaid matter"; describe what is meant by "total representation" in the acts of these defendants on the counterclaim which allegedly constituted "the total representation".

21. State the date and/or dates and the location when the plaintiffs on the counterclaim allegedly fully and fairly stated to the plaintiff, JOHN MEEHAN, ESQ., the facts constituting circumstances relating to the sale of defendants' aforesaid residence, and describe in detail where these allegations were made and the facts and the allegations which allegedly constituted the statement and/or statements made.

22. State the name of the person or persons who allegedly represented the defendants "in the varied services required to prosecute a foreclosure claim and subsequent resistance to the vacating of a judgment of foreclosure and sale as a result of default by JOHN TOMICKI" the date and/or dates when said services were allegedly performed and what said service consisted of on each date.

23. State how it is alleged that these answering defendants on the counterclaim have allegedly wholly failed to exercise their responsibility to defendants.

24. Describe in detail how it is alleged these answering defendants on the counterclaim failed to protect the rights of defendants as mortagees and sellers of said residence.

25. State the acts of commission and/or omission by which it is alleged these defendants on the counterclaim allegedly "negligently, carelessly and unskillfully advised and induced defendants to accomodate unreasonable requests by the said JOHN TOMICKI"; state the date when each alleged negligent advise and inducement allegedly occurred and the name of the party or parties who allegedly gave said negligent advise and inducement.

26. State how it is alleged these answering defendants on the counterclaim failed to advise defendants-plaintiffs on the counterclaim of all transations having relevance to the aforesaid matter; describe in detail each and every aforesaid transation that these answering defendants on the counterclaim failed to advise plaintiffs on the counterclaim of, and how said failure to advise allegedly prejudiced defendants in interests.

27. State the acts of commission and/or omission by which it is alleged these answering defendants on the counterclaim acted in an unprofessional manner and in dereliction of their professional responsibility to defendants-plaintiffs on the counterclaim.

28. State how it is alleged these answering defendants on the counterclaim breached any contract with plaintiffs on the counterclaim or violated their retainer by failing to protect the interest of defendants-plaintiffs on the counterclaim

29. Describe in sufficient detail to permit recognition and/or comprehension thereof those "certain conditions which resulted in prejudice to defendants' interests" which these defendants on the counterclaim allegedly caused; state how the aforesaid acts or omissions were allegedly in violation of the standards of professional conduct for which these defendants on the counterclaim were charged.

30. Give an itemized account of the alleged damages of the plaintiffs on the counterclaim, including an itemized account of how they arrive at the damages alleged, namely FIVE HUNDRED THOUSAND ($500.000.00) DOLLARS on each of the three causes of action, making cumulative sum of ONE MILLION FIVE HUNDRED THOUSAND ($1,500,000.00) DOLLARS.

31. Describe each and every service in furtherance of the aforesaid retainer agreement which these defendants on the counterclaim allegedly failed to provide.

32. State the acts of commission and/or omission by which it is alleged these answering defendants allegedly otherwise acted in an unprofessional manner.

33. With respect to these defendants on the counterclaim, MHEHAN & FINK, ESQS., state whether the contract and/or agreement of retainer was oral or in writing; if oral state the substance and all pertinent details thereof; if in writing set forth a true and exact copy thereof; state the date and/or dates when said contract was allegedly made and identify the party or parties who entered into said contract on behalf of both the plaintiffs on the counterclaim and the defendants on the counterclaim.

34. In what manner is it alleged that these answering defendants on the counterclaim breached any said contract and/or agreement of retainer.

35. Give a detailed account and description of those acts on the part of these defendants on the counterclaim which allegedly constituted a conflict of interest with respect to certain transactions between these defendants on the counterclaim and JOHN TOMICKI allegedly in prejudice of the rights of the plaintiffs on the counterclaim.

36. State how it is alleged that said conflicts of interest were known to these defendants on the counterclaim.

37. State and describe in detail how it is alleged these def endants on the counterclaim allegedly acted adverse to defendants' interests.

38. Have you sustained any additional financial losses as a result of the incident complained of, other then those covered by preceding interrogatories? If so, state:
(a) the nature and amount os such losses.
(b) the date thereof.
(c) the names and addresses of any persons to whom any money so claimed as an additional loss was paid.

86-96

Dated: New York, N.Y., February 3, 1976.

Yours, etc.,

McLAUGHLIN, SIMONE & LAWLOR

RAYMOND G. LAWLOR

By _____
a member of the firm
Attorneys for Defendants on the Counterclaim,
MEEHAN & FINK, ESQS.
Office & P. O. Address
80 John Street
New York, New York 10038

(212) 248-4430

TO:
TICKTIN, MALKIN & ROSENBERG, ESQS.
Attorneys for Defendants-Plaintiffs
on the Counterclaim
Office & P. O. Address
477 Madison Avenue
New York, New York 10022
(212) 758-3404

COUNTY OF NEW YORK

[8-97]

The undersigned, an attorney admitted to practice in the Courts of New York State, states, that affirmant is a member of the firm of McLAUGHLIN, SIMONE & LAWLOR, the attorneys for the defendant(s) as designated and affirms that the following statements are true, under the penalties of perjury. Affirmant has read the foregoing answer

and knows the contents thereof. The same is true to affirmant's knowledge, except as to the matters therein stated to be alleged on information and belief; and that as to those matters affirmant believes it to be true. The reason why this verification is made by affirmant and not by the defendant(s) is because the defendant(s) is not within New York County where the attorneys maintain their offices; and that the source of affirmant's knowledge, and the grounds of belief as to those matters therein stated to be alleged on information and belief are correspondence and investigations which have been made concerning the subject matter of this action, and which are in the possession of the said attorneys.

Dated: New York, New York _____

STATE OF NEW YORK
COUNTY OF NEW YORK

(A) CORPORATE VERIFICATION
(B) INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent

(A) is an officer, to wit, of the within named corporation
(B) in the within action is a defendant
Deponent has read the foregoing answer
and knows the contents thereof. The same is true to deponent's knowledge, except as to matters therein stated to be alleged on information and belief; and as to those matters, deponent believes it to be true.

Sworn to before me this date
, 19 _____

STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIDAVIT OF SERVICE
BY MAIL

Arthur Fondberg being duly sworn, deposes and says that deponent is a clerk in the office of McLAUGHLIN, SIMONE & LAWLOR, attorneys for one of the parties herein: is over 18 years of age; is not a party to the action. . That deponent served the within Interrogatories on February 6 , 19 76 upon the below named attorney(s) for the listed parties, by depositing a true copy of the same securely enclosed in a postpaid wrapper in the Letter Box maintained and exclusively controlled by the United States Postal Service at 80 John Street, New York, New York 10038; directed to the said attorney(s) at the address indicated below; that being the address within the state designated by said attorney(s) for that purpose, or the place where said attorney(s) then kept an office, between which places there then was and now is a regular communication by mail as follows:

TICKTIN, [illegible] & ROSENBERG, ESQS.
[illegible] for Defendants-Plaintiffs
[illegible] Counterclaim
[illegible] Madison Avenue
New York, New York 10022

Sworn to before me, this date 6
February , 19 76

Arthur Fondberg

[illegible] Commission

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN F. MEEHAN AND ROBERT W. FINK,
d/b/a MEEHAN & FINK,

Plaintiffs,

- against -

JOHN SNOW AND JUDY SNOW,

Defendants.

----------x

MEMORANDUM OF LAW

Index #75 Civ 5891
(HFW)

FACTS:

Plaintiffs, attorneys pro se, instituted suit in Supreme Court, State of New York, in September, 1975, to recover fees alleged due by defendants for services rendered. Defendants, now Pennsylvania citizens, removed the action to Federal Court. Thereafter, by leave of court, plaintiffs amended the Complaint to include causes of action for defamation of one of the plaintiffs, John F. Meehan. An Amended Complaint was served on defendants' attorney by mail on September 15, 1976. Defendants' attorney admits failing to serve an Answer until October 8, 1976.

Defendants' attorney cites as excuses for default, inter alia, a "hectic practice" and confusion of "Federal Court Practice with New York State Practice." As to the merits of the defendants' claims, defendants' attorney states in his

Affirmation, paragraph 7: "Defendants have a good and meritorious defense and counterclaim against plaintiffs as more fully set forth in the answer and proposed answer to the amended complaint, a copy of which is annexed hereto."

The sole document which demonstrates the merits of defendants' case is a pleading signed by an attorney with only hearsay knowledge of the transactions. A Demand for Interrogatories served on defendants on February 6, 1976, was never answered.

Defendants' attorney cites Moore's Federal Practice and one case, Gomes v Williams, C.A.N.M.1970, 420 F.2d 1364, as authority for defendants' request that plaintiffs' motion be denied.

SUMMARY OF ARGUMENT

The defendants seek to show a meritorious defense or claim by reference to a pleading signed by an attorney with no personal knowledge of the facts. A search of the record provides no facts to support the defendants' allegations, and shows a history of delay on the part of the defendants. The defendants have failed to meet the burden of showing a meritorious defense or claim.

DEFENDANTS HAVE FAILED TO SUSTAIN
THEIR BURDEN OF SHOWING A
MERITORIOUS DEFENSE

A motion pursuant to Rule 55 (b) (2) is addressed

to the discretion of the court. 6 Moore's Federal Practice Section 55.05(2).

Plaintiffs have not taken issue with defendants' excuse for default. However, plaintiffs do contend that defendants have failed to sustain their burden of presenting a meritorious defense.

The record shows that not a single pleading nor a single Affidavit has been submitted by the defendants. Defendants' attorney, Donald Rosenberg, has been the only person to provide the written opposition to plaintiffs' motion for a default (or for plaintiffs' motion to amend the Complaint).

Mr. Rosenberg was retained after the events sued upon had terminated, and he has conducted no discovery proceedings. In short, Mr. Rosenberg's knowledge is based upon hearsay.

Perhaps the most important documents which would have shown a meritorious defense, the Answers to the Interrogatories, were never answered by the defendants.

Defendants cite Gomes v Williams, C.A.N.M.1970, 420 F.2d 1364 as authority for the proposition that the preferred disposition of the case should be on the merits.

In Gomes v Williams, op. cit., defendant failed to plead or defend and a default judgment was entered by the

court. Defendants' motion to set aside the default was denied, and he appealed.

The Circuit Court did state the proposition set forth by defendants' attorney, but it held that a party must show a good reason for default and that a meritorious defense exists. The only defense set forth was a statement by the defendants' attorney. The District Court's decision denying defendant's motion to vacate the default was affirmed.

Addressing his Affirmation to the merits of the defendants' position, defendants' attorney, Donald Rosenberg, stated: "Defendants have a good and meritorious defense and counterclaim against plaintiffs as more fully set forth in the answer and proposed answer to the amended complaint, a copy of which is annexed hereto."

The pleading was signed by Mr. Rosenberg, a person whose knowledge is based upon hearsay.

Even if one of the defendants had signed the pleading, the affirmative defenses and counterclaims set forth are entirely devoid of factual support, and as such, the Answer fails to sustain the burden of presenting a meritorious defense.

In Consolidated Masonry & Fireproofing, Inc. v Wagman Construction Corporation, C.A.Va.1967, 383 F.2d 249, the court affirmed the District Court's refusal to set aside a default judgment. The court held that bare allegations, without a statement of underlying facts, was insufficient to present a

meritorious defense. (See also Oceanic Trading Corp. v Vessel Diana, D.C.N.Y.1970, 423 F.2d 1, where the court noted that sworn statements and exhibits, and not hearsay statements of counsel were required [to support a judgment]; see also "C.O." Beshear v Weinzapfel, C.A.Ind.1973, 474 F.2d 127 where the court sustained denial of plaintiff's motion to vacate a default where, in addition to plaintiff's failure to adequately explain the default, the court found that the plaintiff had not alleged facts sufficient to constitute a meritorious defense.)

CONCLUSION:

Defendants have failed to set forth a meritorious defense and plaintiffs' motion for a default judgment should be granted.

Respectfully Submitted,

MEEHAN & FINK, ESQS.
Attorneys Pro Se
Office & P. O. Address
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

A-103

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN F. MEEHAN AND ROBERT W. FINK,
d/b/a MEEHAN & FINK,

Plaintiffs,

- against -

JOHN SNOW AND JUDY SNOW,

Defendants.

----------x

MEMORANDUM OF LAW

Index #75 Civ 5891
(HFW)

FACTS:

Plaintiffs, attorneys pro se, instituted suit in Supreme Court, State of New York, in September, 1975, to recover fees alleged due by defendants for services rendered. Defendants, now Pennsylvania citizens, removed the action to Federal Court. Thereafter, by leave of court, plaintiffs amended the Complaint to include causes of action for defamation of one of the plaintiffs, John F. Meehan. An Amended Complaint was served on defendants' attorney by mail on September 15, 1976. Defendants' attorney admits failing to serve an Answer until October 8, 1976.

Defendants' attorney cites as excuses for default, inter alia, a "hectic practice" and confusion of "Federal Court Practice with New York State Practice." As to the merits of the defendants' claims, defendants' attorney states in his

Affirmation, paragraph 7: "Defendants have a good and meritorious defense and counterclaim against plaintiffs as more fully set forth in the answer and proposed answer to the amended complaint, a copy of which is annexed hereto."

The sole document which demonstrates the merits of defendants' case is a pleading signed by an attorney with only hearsay knowledge of the transactions. A Demand for Interrogatories served on defendants on February 6, 1976, was never answered.

Defendants' attorney cites Moore's Federal Practice and one case, Gomes v Williams, C.A.N.M.1970, 420 F.2d 1364, as authority for defendants' request that plaintiffs' motion be denied.

SUMMARY OF ARGUMENT

The defendants seek to show a meritorious defense or claim by reference to a pleading signed by an attorney with no personal knowledge of the facts. A search of the record provides no facts to support the defendants' allegations, and shows a history of delay on the part of the defendants. The defendants have failed to meet the burden of showing a meritorious defense or claim.

DEFENDANTS HAVE FAILED TO SUSTAIN
THEIR BURDEN OF SHOWING A
MERITORIOUS DEFENSE

A motion pursuant to Rule 55 (b) (2) is addressed

to the discretion of the court. 6 Moore's Federal Practice Section 55.05(2).

Plaintiffs have not taken issue with defendants' excuse for default. However, plaintiffs do contend that defendants have failed to sustain their burden of presenting a meritorious defense.

The record shows that not a single pleading nor a single Affidavit has been submitted by the defendants. Defendants' attorney, Donald Rosenberg, has been the only person to provide the written opposition to plaintiffs' motion for a default (or for plaintiffs' motion to amend the Complaint).

Mr. Rosenberg was retained after the events sued upon had terminated, and he has conducted no discovery proceedings. In short, Mr. Rosenberg's knowledge is based upon hearsay.

Perhaps the most important documents which would have shown a meritorious defense, the Answers to the Interrogatories, were never answered by the defendants.

Defendants cite Gomes v Williams, C.A.N.M.1970, 420 F.2d 1364 as authority for the proposition that the preferred disposition of the case should be on the merits.

In Gomes v Williams, op. cit., defendant failed to plead or defend and a default judgment was entered by the

court. Defendants' motion to set aside the default was denied, and he appealed.

The Circuit Court did state the proposition set forth by defendants' attorney, but it held that a party must show a good reason for default and that a meritorious defense exists. The only defense set forth was a statement by the defendants' attorney. The District Court's decision denying defendant's motion to vacate the default was affirmed.

Addressing his Affirmation to the merits of the defendants' position, defendants' attorney, Donald Rosenberg, stated: "Defendants have a good and meritorious defense and counterclaim against plaintifis as more fully set forth in the answer and proposed answer to the amended complaint, a copy of which is annexed hereto."

The pleading was signed by Mr. Rosenberg, a person whose knowledge is based upon hearsay.

Even if one of the defendants had signed the pleading, the affirmative defenses and counterclaims set forth are entirely devoid of factual support, and as such, the Answer fails to sustain the burden of presenting a meritorious defense.

In Consolidated Masonry & Fireproofing, Inc. v Wagman Construction Corporation, C.A.Va.1967, 383 F.2d 249, the court affirmed the District Court's refusal to set aside a defaultjudgment. The court held that bare allegations, without a statement of underlying facts, was insufficient to present a

meritorious defense. (See also Oceanic Trading Corp. v Vessel Diana, D.C.N.Y.1970, 423 F.2d 1, where the court noted that sworn statements and exhibits, and not hearsay statements of counsel were required [to support a judgment]; see also "C.O." Beshear v Weinzapfel, C.A.Ind.1973, 474 F.2d 127 where the court sustained denial of plaintiff's motion to vacate a default where, in addition to plaintiff's failure to adequately explain the default, the court found that the plaintiff had not alleged facts sufficient to constitute a meritorious defense.)

CONCLUSION:

Defendants have failed to set forth a meritorious defense and plaintiffs' motion for a default judgment should be granted.

Respectfully Submitted,

MEEHAN & FINK, ESQS.
Attorneys Pro Se
Office & P. O. Address
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

A-108

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a MEEHAN & FINK, Plaintiffs,	)	
- against -	)	NOTICE OF REJECTION
JOHN SNOW AND JUDY SNOW, Defendants.	)	Civil Action 75-5891

PLEASE TAKE NOTICE that the annexed Answer to the Amended Complaint is herewith rejected due to untimely service.

Dated: October 15, 1976

MEEHAN & FINK, ESQS.

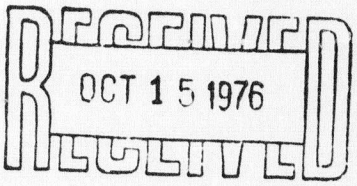
By

A Member of the Firm
Attorneys Pro Se
Office & P. O. Address
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P O BOX 391
GOSHEN, NEW YORK 10924
(914) 294-5421

A-109

JOHN F. MEEHAN



UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a/
MEEHAN & FINK

Plaintiffs,

-against-

JOHN SNOW and JUDY SNOW,

Defendants.

ANSWER TO
AMENDED COMPLAINT

Index No. 75 CIV5891

Defendants, by their attorneys, VOGEL MARKS & ROSENBERG, as successor to TICKTIN MALKIN & ROSENBERG a dissolved law partnership, as and for their answer to the amended complaint, hereby allege as follows:

1. Admits the allegations in the paragraphs of the Complaint numbered "1", "2", "5" and "6".

2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs of the Complaint numbered "3" and "14".

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of the Complaint numbered "4", except denies there are any monies due plaintiff or plaintiffs for professional services rendered and disbursements expended.

4. Denies each and every allegation contained in paragraphs of the Complaint numbered "7", "8", "9", "11", "15", "16", "17", "18", "21", "22" and "23".

5. Denies the allegations of paragraph numbered "10" of the Complaint, except admits that ONE HUNDRED AND NINETY-ONE DOLLARS AND SIXTY CENTS ($191.60) has been paid.

6. Repeats, reiterates and realleges each and every admission, allegation and denial contained in paragraphs "1" through "5" of this answer insofar as they relate to the allegations in the paragraphs of the Complaint numbered "13" and "20".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

7. This Court lacks jurisdiction over the subject matter of the claim against defendants.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

8. This Court lacks jurisdiction over the persons of the defendants.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

9. The Complaint fails to state a claim against defendants upon which relief may be granted.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

10. Defendants deny that the work, labor, and services alleged in plaintiffs' complaint herein, to have been performed for defendants by plaintiffs, were of the fair and reasonable value of FOURTEEN THOUSAND THREE HUNDRED AND SIXTEEN DOLLARS AND SIXTY-ONE CENTS ($14,316.61).

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

11. The plaintiffs herein have no legal capacity to sue and cannot maintain this action in that they are not the real party in interest.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

12. This action is barred by the doctrine of laches.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

13. Plaintiffs have no legal capacity to sue and cannot maintain this action.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

14. Plaintiffs cannot maintain this action and have no legal capacity to sue in that they are not the real party in interest.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE
TO THE SECOND AND THIRD CAUSE OF ACTION:

15. Plaintiffs had a generally bad reputation at the time the words complained of were allegedly spoken by defendants.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE AND AS
AND FOR A COUNTERCLAIM AGAINST PLAINTIFFS:

16. At all times hereinafter mentioned defendants are and were residents of the State of Pennsylvania.

17. At all times hereinafter mentioned plaintiffs were and still are attorneys and counsellors-at-law, duly licensed admitted as such having offices at Route 17M, Goshen, New York.

18. In or about May, 1973, defendants retained the services of JOHN MEEHAN, ESQ., as attorney to represent defendants in certain matters including, but not limited to, the negotiation and sale of defendants' residence in Goshen, New York.

19. Plaintiff, JOHN MEEHAN, thereafter accepted said retainer and employment as the attorney for defendants and undertook the total representation of defendants in the aforesaid matter in a proper, skillful and professional and diligent manner.

20. Defendants fully and fairly stated to plaintiff, JOHN MEEHAN, ESQ., the facts constituting the circumstances relating to the sale of defendants' aforesaid residence.

21. Plaintiff, JOHN MEEHAN, thereafter formed a partnership with one ROBERT W. FINK, both of whom are plaintiffs in the within action and who continued the representation of defendants in the varied services required to prosecute a foreclosure claim and subsequent resistance to the vacating of a judgment of foreclosure and sale as a result of a default by JOHN TOMICKI, the original contract purchaser of defendants' residence in Goshen, New York.

22. Notwithstanding plaintiffs' professional responsibility to diligently, competently and professionally render legal services to defendants in the aforesaid matter, plaintiffs have wholly failed to exercise their responsibility to defendants in that they failed to protect the rights of defendants as mortgagees and sellers of said residence, negligently, carelessly and unskillfully advised and induced defendants to accomodate unreasonable requests by the said JOHN TOMICKI, failed to advise defendants of all transactions having relevance to the aforesaid matters, in that plaintiffs acted in an unprofessional manner and in dereliction of their professional responsibility to defendants in violation of their retainer by failing to protect the interests of defendants and causing certain conditions which resulted in prejudice to defendants' interests all of which are in violation of the standard of professional conduct for which plaintiffs were charged in rendering services on defendants' matters as aforesaid.

23. Solely by reason of the foregoing negligence of plaintiffs, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE
AND SECOND COUNTERCLAIM AGAINST PLAINTIFFS:

24. Defendants repeat and reallege paragraphs numbered "16" through "22" inclusive, as if same were more fully set forth herein.

25. Plaintiffs contracted with the defendants as part of the agreement of retainer, to perform services on behalf of defendants in a professional and skilled manner.

26. By failing to provide said services in furtherance of said retainer agreement and in otherwise acting in an unprofessional manner in violation of said retainer agreement, plaintiffs breached their aforesaid agreement and contract with defendants.

27. Solely by reason of the foregoing breach of contract by plaintiffs, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
AND THIRD COUNTERCLAIM AGAINST PLAINTIFFS:

28. Defendants repeat and reallege paragraphs numbered "16" through "22" as if more fully set forth herein.

29. Plaintiffs in certain respects, acted wilfully in conflict of interest with respect to certain transactions between plaintiffs and each of them and JOHN TOMICKI in prejudice of defendants' rights, which conflict of interest was known to plaintiffs and upon which they acted adverse to defendants' interests.

30. By reason of the foregoing acts of plaintiffs and their failure to act, defendants have been damaged in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

WHEREFORE, defendants demand judgment dismissing the complaint, costs and disbursements in defending this action, including reasonable attorneys' fees and for judgment against plaintiffs, joint and several, on defendants' counterclaims in the total cumulative sum of ONE MILLION FIVE HUNDRED THOUSAND ($1,500,000.00) DOLLARS with interest together with costs and disbursements.

VOGEL MARKS & ROSENBERG
As successor to Ticktin Malkin
& Rosenberg, a dissolved law
partnership

By: Donald B. Rosenberg
A Member of the Firm
Attorneys for Defendants
477 Madison Avenue
New York, N. Y. 10022
(212) 758-3404

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DONALD B. ROSENBERG, being duly sworn, deposes and says, that he is a member of the firm of VOGEL MARKS & ROSENBERG, attorneys

A-116

for defendants in this action and that the foregoing answer is true to his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true; that the grounds of his belief as to all matters not stated upon his knowledge are correspondence and other writings furnished to him by defendants and interviews with defendants; and that the reason why the verification is not made by defendants is that defendants are not residents of the State of New York.

DONALD B. ROSENBERG

Sworn to before me this

8th day of October, 1976.

JACK VOGEL
Notary Public, State of New York
No. 41-4107326
Qualified in Queens County
Commission Expires March 30, 1977

IA-117

2/2/77

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN F. MEEHAN and ROBERT W. FINK, d/b/a MEEHAN & FINK,

Plaintiffs,

- against -

JOHN SNOW and JUDY SNOW,

Defendants.

----------x

MEMORANDUM DECISION

75 Civ. 5891 (HFW)

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

This action to collect unpaid attorneys' fees was commenced in the Supreme Court of the State of New York, Orange County, in September of 1975. After defendants' petition for removal pursuant to 28 U.S.C. § 1446 (Supp. IV 1974) was granted, defendants filed an answer and subsequently, with leave of the court, plaintiffs served an amended complaint containing two additional causes of action for defamation. When defendants failed to answer the amended complaint within the required time period, plaintiffs caused a default to be entered and moved pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure for a judgment of default. This motion is opposed by the defendants, but they have not submitted a cross-motion to set aside their default.

Counsel for the defendants "admits candidly" that his answer was untimely, but contends that he is "essentially a state court practitioner" unfamiliar with federal procedural requirements, that no prejudice to the plaintiffs resulted from his failure to act promptly and that the court should, therefore, exercise its discretion to deny plaintiffs' motion and proceed to a hearing on the merits. I

disagree.

While the court is ordinarily sympathetic to the travails of attorneys unacquainted with practice under the Federal Rules of Civil Procedure, the additional burden upon counsel for the defendants here, if any, was caused by his decision to remove this action to federal court. He has also failed to answer interrogatories served by the plaintiffs on February 6, 1976. Consequently, it can hardly be said that entry of a default judgment here would work an injustice in view of his continuing course of conduct.

In deciding a motion under Rule 55(b)(2), the court may properly consider, inter alia:

> "whether the defendants' failure to plead or otherwise defend is largely technical; whether the plaintiff will be prejudiced, and, if so, the extent thereof; [and] whether the entry of the default judgment would result in injustice." 6 Moore's Federal Practice ¶ 55.05[2] (2d ed. 1976).

On a motion to set aside a default judgment pursuant to Rule 60(b), Fed. R. Civ. P., a defendant must make a more extensive showing: he must demonstrate that there is a good reason for the default and that a meritorious defense to the action exists. Unlike Rule 55(b)(2), Rule 60(b) also permits the court to condition any grant of relief from the operation of a default "upon such terms as are just," including the imposition of costs or fees. 7 Moore's, supra at ¶ 60.19.

In the instant action, there is some question as to the existence of a meritorious defense. (Indeed, the first two affirmative defenses in the proposed answer to the amended complaint allege that this court lacks subject matter and personal jurisdiction over the defendants despite their decision to remove the action here.) The court therefore believes that defendants and their counsel should be held to the higher burden and additional strictures of Rule 60(b). Consequently,

A-119

a judgment of default will be entered against defendants; however, they will be given 30 days from the filing of this memorandum decision in which to move to set aside their default.

SUBMIT JUDGMENT.

DATED: New York, New York

February 2, 1977

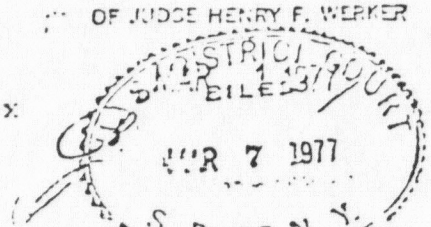
Henry F. Werker

U. S. D. J.

A120

NOSEL MARKS & ROSENBERG

RECEIVED IN CHAMBERS
OF JUDGE HENRY F. WERKER



UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
----------x

JOHN F. MEEHAN AND ROBERT W. FINK,
d/b/a MEEHAN & FINK,

Plaintiffs,

-against-

JOHN SNOW AND JUDY SNOW,

Defendants.

----------x

75 CIV 5891 (HFW)

I 77,344

The action having come on before the Court, the Honorable Henry F. Werker, District Judge, presiding, by motion for judgment upon default, and the issues having been duly considered, and a decision having been rendered,

IT IS ORDERED AND ADJUDGED

that the plaintiffs John F. Meehan and Robert W. Fink d/b/a Meehan & Fink, with a place of business located at (no number), Route 17M, Goshen, Orange County, New York, recover of the defendants John Snow and Judy Snow, residing at (street unknown), R. D. #5, Carlisle, Cumberland County, Pennsylvania, on the first cause of action, the sum of FOURTEEN THOUSAND THREE HUNDRED SIXTEEN DOLLARS FIFTY ONE CENTS ($14,316.51), with interest from the 24th day of September, 1975 in the amount of ONE THOUSAND TWO HUNDRED TWELVE ($1,212.00) DOLLARS, a sum of FIFTEEN THOUSAND FIVE HUNDRED TWENTY EIGHT DOLLARS FIFTY ONE CENTS ($15,528.51), and that the plaintiffs have execution therefore, and

MAR 8

A-81

IT IS FURTHER ORDERED AND ADJUDGED

that a hearing be set to determine the damages claimed by the plaintiff John F. Meehan on the second and third causes of action, and

IT IS FURTHER ORDERED AND ADJUDGED

that the counterclaims of the defendants John Snow and Judy Snow be and the same are hereby dismissed without prejudice, a

IT IS FURTHER ORDERED AND ADJUDGED

that the defendants John Snow and Judy Snow will be given sixty (60) days from the filing of the Memorandum Decision dated February 2, 1977 in which to move to set aside their default, and

IT IS FURTHER ORDERED AND ADJUDGED

that plaintiffs are stayed from execution and enforcement of the within judgment until sixty (60) days have elapsed from the date of filing of the Memorandum Decision dated February 2, 1977 or thirty (30) days following the date of filing of the decision for defendants' motion, if timely made, to set aside defendants' default, whichever later occurs.

Dated at New York, New York the 4th day of March, 1977.

Judgment Entered — 3/8/77

Henry Werker
~~CLERK OF THE COURT~~
USDJ.

Raymond F. Burghardt
Clerk of the Court

A-122

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN AND ROBERT W. WINK d/b/a MEEHAN & FINK, Plaintiffs,	)	Civil Action 75 Civ. 5891 (H.F.W.)
- against -	)	
JOHN SNOW AND JUDY SNOW, Defendants.	)	

MOTION TO VACATE AND SET ASIDE
A FINAL JUDGMENT OF DEFAULT

Defendants move the Court, pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure, to vacate and set aside the final judgments entered against Defendants in this cause on the 7th day of March, 1977, and to grant leave to Defendants to file an amended Answer, a copy of which is annexed hereto on the ground that said default judgment obtained by Plaintiffs was solely the result of Defendants' mistake, inadvertence, and excusable neglect, as more fully appears from the Affidavits of Defendants and Donald B. Rosenberg with related Exhibits annexed hereto.

VOGEL MARKS & ROSENBERG

BY: _____

A Member of the Firm
Attorneys for Defendants
477 Madison Avenue
New York, New York 10022
Tel: 212 - 758-3404

A-123

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before the Court at 607E, United States Courthouse, Foley Square, City and State of New York on the 20th day of April, 1977, at 10:00 in the forenoon of that day, or as soon thereafter as counsel can be heard.

VOGEL MARKS & ROSENBERG

By: _____
A Member of the Firm
Attorneys for Defendants
477 Madison Avenue
New York, New York 10022
Tel: 212 - 758-3404

A-124

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- X

JOHN F. MEEHAN and ROBERT W. FINK, d/b/a MEEHAN & FINK,

Plaintiffs,

- against -

JOHN SNOW and JUDY SNOW,

Defendants.

- X

Index # 75 CIV 5891

AFFIDAVIT

STATE OF PENNSYLVANIA)
: ss.:
COUNTY OF CUMBERLAND)

JUDY SNOW and JOHN SNOW, being duly sworn, depose, and say :

1. We are the Defendants in the above entitled action and submit this Affidavit in support of the within motion to set aside the default judgment entered by the Plaintiffs.

2. Our defenses and counterclaims are substantially based upon Plaintiffs' breach of their professional duties to us as clients in their representation of us in the sale of our house and property located in Goshem, New York and subsequent foreclosure litigation which followed.

3. Contracts of Sale were executed and a Deed was delivered conveying Defendants' property on September 18th,

1973 to John Tomicki's corporation, Golden Triangle Realty, Inc. subject to two substantial purchase money mortgages. Subsequently, said mortgagor defaulted in payment and John Meehan was retained to prosecute a foreclosure action against the defaulting mortgagor. Prolonged litigation followed mortgagor's default in pleading in the foreclosure action wherein the mortgagor repeatedly attempted to vacte its default and assert a defense of usury in the execution of the mortgage. Orders of Supreme Court, Orange County stayed the foreclosure sale on a number of occasions upon the repeated petitions of the mortgagor all based upon its claim of the invalidity of the mortgages given to Defendant, Judy Snow, on the grounds of usury.

4. An initial Contract of Sale was executed between John Tomicki and Judy Snow on June 12th, 1973. Title closing was set for August 15th, 1973.

5. John Tomicki defaulted in appearing at the title closing. We requested of John Meehan that the Contract Purchaser, John Tomicki, be declared in default in the transaction but he advised against it because he advised that John Tomicki could tie up the property in litigation by filing a Lis Pendens. We relied upon his advice as our attorney since he insisted that he handle all matters between John Tomicki and us relating to the purchase of our property.

6. All negotiations between Judy Snow and John

Meehan, on our behalf, and at his insistence after the initial title closing date was not honored by John Tomicki.

7. Without our consent or knowledge, John Meehan sent a letter dated September 5, 1973 to John Tomicki, annexed as Exhibit A, outlining a new proposal for the purchase of our premises. John Meehan never consulted with us in any way regarding the specific proposal outlined in that letter before the letter was sent and had no authority whatsoever to make the proposal stated in the annexed letter. This unauthorized proposal constituted a breach of our attorney-client relationship in this matter.

8. John Meehan advised us that John Tomicki could not obtain his financing. We met with John Meehan after the letter of September 5th, 1973 was sent to John Tomicki to discuss new terms for the purchase. John Meehan said he requested a financial statement from John Tomicki which was ultimately delivered to John Meehan on September 7th, 1973, marked as Exhibit B. Defendants always relied exclusively on John Meehan's judgment and advise. In fact, he kept insisting that Defendants not deal in any manner with John Tomicki, but to leave everything to him. When the Defendants expressed concern that the financial statement was uncertified and unaudited, John Meehan said that it was given by an attorney, and therefore, need not be certified or questioned. If John Meehan had evenly superficially probed

the veracity of the statement, he would have discovered that John Tomicki was in desperately bad financial condition, a fact which Defendants later confirmed. As a matter of fact, in John Meehan's Affidavit in the foreclosure litigation, he stated that the "financial statement [was] delivered to deponent at a point in time which deponent believes was in July [1973] but cannot state with certainty". If John Meehan had the financial statement approximately two months prior to the title closing on September 18th, 1973 coupled with his insistence that he handled all matters in our dealings with John Tomicki in the exercise of his professional responsibility, he should have taken steps to check John Tomicki's financial responsibility and statements. The fact is, that there was a string of money judgments recorded with the County Clerk, Rockland County, John Tomicki's county of residence which predated John Tomicki's financial statement. John Meehan admits in another Affirmation in the foreclosure litigation that "subsequent events, however, revealed substantial judgments filed against Defendant, John Tomicki". If this were known, we would never have contracted with or taken a substantial mortgage from John Tomicki for the purchase of our property. John Meehan never discussed John Tomicki's financial statement with us until September 7, 1973, when it was dated, although he admits that he received it sometime in July, 1973. This

violates his professional duty to Defe nts. John Meehan admits in his affirmation of August 28th, 1974, annexed hereto as Exhibit B that he was aware that John Tomicki's financial statement was false and fraudulent, and Defendants relied upon it. He even admits in Exhibit B that a Lis Pendens was filed against John Tomicki's residence on May 2nd, 1973 more than one month prior to the first June 12th, 1973 contract with John Tomicki. Why didn't Plaintiffs investigate John Tomicki's financial position before advising Defendants to rely upon it on September 7th, 1973 even though Plaintiffs received it two months earlier?

9. The main thrust of John Tomicki's position in his long and vigorous attemps to vacate his default in pleading in the foreclosure action and to assert a defense of usury against Judy Snow was based upon two Contracts of Sale representing the final transaction resulting in the title closing on September 18th, 1973. The form, the alleged dates of execution of the Contracts, and the manner in which they were executed and seemingly altered form the basis of one of our defenses in this action.

10. These documents and the circumstances surrounding their preparation and execution formed the main basis of the foreclosure litigation issues. Although the issues were ultimately resolved in Defendants' favor, through appeal to the Appellate Division, Defendants' claim

that if Plaintiffs had not failed in their professional responsibilities toward Defendants, John Tomicki would not have been provided, as he was, with reasonable cause to challenge our rights to judgment in foreclosure. The sole basis of Tomicki's claims has its source in Plaintiffs' defective and unprofessional preparation of the two Contracts of Sale executed on September 18th, 1973.

11. Simply stated, John Meehan had sworn in Affidavits submitted in opposition to John Tomicki's motion to vacate his defaults in pleading that the two Contracts of Sale were executed on September 10th, 1973. See Exhibit C annexed. John Tomicki swears that the two Contracts of Sale were executed on September 18th, 1973 after the Deed was delivered to his corporation, Golden Triangle Realty Inc. Judy Snow concurs in that assertion. Judy Snow signed the two Contracts of Sale on September 18th, 1973 and not earlier. John Meehan swears that they were signed on September 10th, 1973 in Goshem, New York, which is not true. Judy Snow was in Carlisle, Pennsylvania on September 10th, 1973. See Exhibit D annexed. This issue is critical because if the Contracts of Sale were executed on September 18th, 1973, the date of title closing, John Tomicki had reasonable grounds to assert his claim of usury in the prolonged foreclosure litigation. See annexed Affidavit of John Tomicki, attached

as Exhibit E. Although the Court ultimately rejected John Tomicki's position, John Meehan, by his unprofessional manner in the drafting, execution, and possible alteration of the Contracts presented John Tomicki with a viable ground for attacking the mortgages. Most of Plaintiffs' legal services were consumed in the post title closing foreclosure litigation with John Tomicki and his corporation. We will not burden this Court with annexing all of the papers in the aforesaid litigation except to state that the Orange County Clerk's file measurs about one foot thick.

11. There are many counterparts of the Contracts of Sale, and same are obviously altered as to date. These are grave questions relating to the issue of the execution dates of the Contracts of Sale, an issue which Orange County, Supreme Court's Judge John W. Sweeney commented on in open Court on July 31st, 1974 as follows:

> "...there is a question of fact here, but I must also tell you I want this record to show it very strongly that I feel somebody is possibly practicing a fraud against this Court, and I am not going to let it rest".

This issue of fact caused the Supreme Court to repeatedly grant John Tomicki's applications for further stays of the foreclosure sale. The delays in the ultimate foreclosure sale caused by Tomicki's successful stay applications has caused a grierous financial loss to Defendants. A

purchaser was ready, willing and able to buy our property for $290,000,000 in May, 1974 during the period when the Court granted further stays of the sale to John Tomicki, based on this issue of fact as to potential usury and the date of execution of the Contracts of Sale. All of this delay and Defendants consequential damages would and could have been avoided if Plaintiffs had the Contracts of Sale executed before September 18th, 1973 naming John Tomicki's corporation as the Purchaser lieu of John Tomicki, thus avoiding the issues of conflicting contract execution dates and claims of usury.

13. Time and Time again, Plaintiffs acted without the knowledge or consent of Defendants in negotiating with John Tomicki and extending him more time to close title. This ultimately led to the Contract dated September 10th, 1973 and/or September 18th, 1973 and undated Contracts giving rise to the aforesaid prolonged foreclosure litigation. The litigation resulted from Plaintiffs' neglect in their professional duty to have a legally enforceable and uncontrovertable Contract of Sale executed between the parties.

14. At the title closing, John Meehan handed John Tomicki a bill for $1,800.00, although he advised us that he never had any professional association with John Tomicki.

15. John Meehan did not adequately protect our interests in that he did not insist that real estate taxes

to be paid by John Tomicki at the title closing be paid at that time. Instead, he relied upon John Tomicki's promise to pay them after title closing which he never did causing the Defendants further damage.

16. John Meehan admitted to Defendants directly that he altered the two aforesaid Contracts of Sale at the title closing to add the mortgage interest clause after John Tomicki signed the Contracts of Sale on September 18, 1973.

17. Plaintiffs further breached their professional duties by not causing a financial investigation of Golden Triangle Realty Inc., the grantee and mortgagor of our property.

18. Plaintiffs, without the knowledge and consent of the Defendants, and despite explicit instructions by Defendants to the contrary, waived Defendants' right to have John Tomicki post a Bond as set forth on the Supreme Court, Orange County Order to Show Cause dated July 31st, 1974, annexed as Exhibit F, as a prerequisite to a stay of the foreclosure sale of the premises.

19. Plaintiffs did not obtain a copy of the Appellate Division's Order affirming the decision in Supreme Court, Orange County in a timely manner delaying the ultimate eviction of the mortgagor from the premises.

20. Plaintiffs never demanded from John Tomicki

security for the payment of franchise taxes for Golden Triangle Realty Inc. at the title closing of September 18th, 1973 resulting in a subsequent financial loss to the Defendants.

21. The above facts are stated with the personal knowledge of Defendants relating to the claims of Plaintiffs in their first cause of action. Substantial damages have been incurred by Defendants resulting from Plaintiffs' breach of their professional obligations to Defendants forming the basis of Plaintiffs' claim for compensation.

22. Defendants categorically deny the allegations of Plaintiffs' 2nd and 3rd causes of action. We never made the statements alleged in Plaintiffs' amended Complaint.

23. There are substantial factual issues raised by Defendants' defenses. We are counterclaiming against the Plaintiffs for a substantial amount of money representing the financial loss sustained by Defendants caused by Plaintiffs' lack of performance of their professional duties towards Defendants. Defendants' financial loss continues as a direct result of having made financial commitments in Carlisle, Pennsylvania and elsewhere at Plaintiffs' urging with their assurance that the transaction with John Tomicki would be uneventful and a "good deal". Plaintiffs must bear the responsibility and be accountable to us for their actions and inaction, in part described above, in not

A-134

adequately protecting our interests in accordance with professional standards.

Sworn to before me this
31 day of March, 1977

Janine R. Ullom

JANINE R. ULLOM, NOTARY PUBLIC
SILVER SPRING TOWNSHIP
CUMBERLAND COUNTY
MY COMMISSION EXPIRES MAY 21, 1979

John Snow
JOHN SNOW

Judy Snow
JUDY SNOW

A-135

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN P. MEEHAN AND ROBERT W. FINK d/b/a MEEHAN & FINK, Plaintiffs,	)
- against -	)
JOHN SNOW AND JUDY SNOW, Defendants.	)

DONALD B. ROSENBERG, an attorney at law, hereby affirms under the penalty of perjury as follows:

1. That your affirmant is a member of the firm of VOGEL MARKS & ROSENBERG, attorneys for the defendant in the above action, and am fully familar with the facts hereinafter set forth.

2. Plaintiffs previously moved for leave to enter a default judgment against Defendants based upon Defendants service of their Answer to the amended Complaint ten (10) days beyond the statutory time for said service. The Court rendered a memorandum decision filed February 2nd, 1977 granting Plaintiffs' motion with leave given to Defendants to move to set aside their default upon a showing as set forth in said decision.

3. Defendants submitted a proposed judgment

which was filed by the Court, including a stay of execution of the judgment and a provision granting leave to Defendants to move to set aside their default.

4. The within motion is made in the exercise of Defendants' right as granted by the Court. Affirmant requests that all of the Affidavits and Exhibits submitted on the previous motion made by Plaintiffs as described above be considered by the Court on this motion to be incorporated by reference herein.

5. On the issue of Defendants' required showing of excusable neglect, affirmant respectfully refers the Court to Affirmant's affirmation in opposition to the previous motion. Simply stated, affirmant honestly misunderstood, through inadvertence and mistake, the time within which an Answer to an amended Complaint is to be served under the Federal Rules of Civil Procedure. The served Answer was ten (10) days late. This is the extent of the time involved. No possible claim of prejudice can be made by Plaintiffs nor have they. Although not binding on the Court, Plaintiffs in Robert Fink's affidavit dated November 2, 1976, stated, "...Plaintiffs cannot take serious issue with Mr. Rosenberg's excuse for the default..." The Courts have held in similar cases that counsel's neglect in failing to file a timely Answer is excusable neglect. Affirmant respectfully regrets

and apologizes for his mistake in assuming erroneously the time within which the Answer was to be served. No prejudice is imposed on Plaintiffs by this mistake, but, irreversible prejudice will be imposed on Defendants by denial of this motion. Defendants have a meritorious defense as set forth in some detail in the annexed affidavit of Defendants. The allegations of Plaintiffs' second and third causes of action lying in defamation are flatly denied by Defendants. They claim never to have made the alleged actionable utterances. This raises a sharp issue of fact which can only be adjudicated on trial after proof is submitted to a jury as finders of facts.

6. Much detail is given in Defendants' affidavits as to acts and failure to act by Plaintiff to raise many issues of fact relating to the quality of professional services rendered by Plaintiffs in forming the basis of their claims. A counterclaim is asserted by Defendants in an amount far in excess of Plaintiffs' monetary claims. Defendants have been severely and irrepairably damaged as a result of Plaintiffs' failure to diligently and competently represent Defendants.

7. In addition to the facts set forth in Defendants' amessed affidavit, affirmant, as an attorney, has assessed, further grounds for Defendants' defense and counterclaims.

8. Plaintiffs failed to cause a timely deficiency judgment to be entered within the statutory period following the confirmation of the referee's report of sale. No early assertion was made by Plaintiffs in opposition to the Mortgagor's repeated petitions for stays of the foreclosure sale, all to the effect that no usury defense is available to the mortgagor because the mortgages were purchase money mortgages. Interest in excess of statutory maximums are considered a part of the consideration of the purchase price. The state court, referred to this in one of its decisions but Plaintiff never raised it early and decisively in the litigation and cut short the mortgagor's grounds for further applications for relief.

9. The delays in the final foreclosure sale and ultimate repossession of Defendant's property were considerable causing increasing financial loss to Defendants. Defendants were deprived of the right to mitigate their damages by early resale of their property to a ready, willing, and able potential purchasers for $290,000.00 as set forth in Defendants' affidavit.

10. If Plaintiff had declared Tomicki in default in accepting title pursuant to the June 12, 1973 contract and had not made available to Tomicki, reasonable grounds for his numerous petitions for stays of the foreclosure sale on the

various facts set forth in Defendants' affidavits, Defendants would not have been damaged as severely as they have.

11. Plaintiffs made serious departures from professional standards in their representation of Defendants. The many affidavits of Plaintiff, John Meehan, himself presents proof of these facts and support Defendants' defense and counterclaims.

12. Defendants are fully prepared to establish their defense and counterclaim on trial.

13. We urge the Court in balancing the equities and potential injustices in its consideration of this motion to resolve any doubts in favor of a disposition of this case on the merits. The defenses herein deserve full judicial srutiny on trial when the quality of Plaintiffs' professional services may reviewed in detail.

WHEREFORE, affirmant respectfully requests that the motion herein be granted in all respects.

Dated: April 1, 1977

Donald B. Rosenberg

A-140

LAW OFFICES
JOHN F. MEEHAN

50 NORTH CHURCH STREET
GOSHEN, NEW YORK 10924

AREA CODE 914
294-5421
RES: 294-6734

September 5, 1973

John T. Tomicki, Esq.
Village Square
West Nyack, New York 10995

Re: Snow to Tomicki

Dear Mr. Tomicki:

It is our understanding that you are unable to obtain financing for the purchase of the Snow property and that you are in danger of defaulting under the contract. It is not Mrs. Snow's intention to create a problem for you. However, you can appreciate the fact that your inability to come up with the all but fifty thousand dollars has created a severe problem for the Snows.

Accordingly, I believe it would be proper for us to prepare new contracts; one dealing with the house and the other with the land. It is proposed, therefore, the contracts be drawn which will reflect a $2,500 down payment for the land and a $22,500 down payment on the house; that you will pay $50,000 additionally against the house property leaving a mortgage of $45,000.

We have been advised by the Goshen Savings Bank that they will agree to permit you to assume the mortgage presently existing in the approximate amount of $42,000, with interest at 8% and with about a nineteen and one-half year amortization. Accordingly then we will have a mortgage on the land for $188,000, with interest at 14%, interest to be paid quarterly in the first two years; balance payable in ten with a fifteen year amortization schedule and principal and interest to be paid commencing the third year. On the house mortgage the rate will be 12 1/2%, two year's interest only, and the mortgage will be due and payable in eight years. That too will provide fifteen year amortization with quarterly payments of interest and commencing the third year with interest and principal.

While the house property will be separately mortgaged under the initially proposed contract, the Snows will of course require a second lien on that property to collaterally secure the note on the land.

EXHIBIT A

A-141

September 5, 1973

Re: Snow to Tomicki

I believe that arranging the matter as set forth above will ease your burden, insure no default on your part and at the same time will permit the Snows to apply the proceeds to the home they are buying in Pennsylvania to which they previously committed themselves.

Very truly yours,

John F. Meehan

JFM:jb

A-142

JOHN T. TOMICKI, JR.
ATTORNEY AT LAW
VILLAGE SQUARE
WEST NYACK, NEW YORK 10994

(914) 358-1050

ASSETS:		CURRENT LIABILITIES:	
Cash	$ 2,489.	Dime Savings Bank of Brooklyn	$15,000.
Office furniture and fixtures	5,239.		
Accounts receivable	42,500.		
Commissions receivable	31,250.	Various bank loans and short term debts	10,700.
Automobiles (current value)	3,000.		
Securities & Investments:		TOTAL LIABILITIES	$25,700.
Castle Realty, Inc.	11,750.		
Nuvisions Media, Inc.	900.		
Camden Oil	1,900.		
Golden Triangle Realty, Inc.	25,000.		
Hudson Valley Associates	5,000.		
M. Tark Properties Assoc.	2,500.		
Antiques (at cost)	8,157.		
Residence (at appraised value)	50,000.		
TOTAL ASSETS	$189,685.	NET WORTH	$163,985.

Certified to be correct.

John T. Tomicki
9/7/73

EXHIBIT "A"

EXHIBIT B

of $79,998.00 recorded in the Orange County Clerk's Office in Liber 1640 of Mortgages at page 895, representing a debt not reflected in the financial statement.* On January 11, 1972 in a land deal in the Town of Chester, Orange County, New York, defendant John Tomicki with others personally obligated himself for $600,000.00. Copy of said instrument is annexed hereto and made a part hereof and marked Exhibit "B-1". This obligation, upon information and belief was open and outstanding as of the time the said financial statement was certified.

9. Defendant states that the plaintiff cannot be harmed by a delay. The facts are otherwise. Plaintiff sold and relocated in Pennsylvania in the latter part of August because of financial difficulties. They relied on the sale of their property assuming that they were going to receive $300,000.00 in cash. The new total of $75,000.00 was not sufficient to rescue them from their own problems. Plaintiff, now threatened with insolvency, is in dire need of funds which can only be realized from a sale of the real property.

10. Annexed hereto and marked Exhibit "E" is a letter from the Goshen Savings Bank showing the current balance on the first mortgage which has been permitted to lapse into default by the defendant. It appears obvious from the inattention to the Goshen Savings Bank obligation that defendant has no intention of paying any obligation. Further, payment has been demanded by the bank from plaintiff. (Exhibit "F")

11. The plaintiff Judy Snow through deponent pressed for a closing. It was her right under contract and the defendant was already in default of that contract. John Tomicki is a practicing attorney and not a novice. The fact that he placed himself in a position of jeopardy was not the doing of the plaintiff nor did she demand from him anything that she was not entitled to. As a matter of fact they did as much as they could to help. Finally, it was always thought by your deponent and by the plaintiff that title was to be taken in a corporation; that, as a matter of fact, the strange configuration of the first mortgage wherein the house property and ten acres was divided was done so at defendant John Tomicki's request on the basis of his assertion that he hoped to be able to spin-off from the corporation the property with the house for his own use. The offer of interest of 15% was made by defendant John Tomicki. That as subsequently developed it was impossible for him to have title in his own name.

Annexed hereto and marked Exhibit "B-2" is an original letter of inquiry to the Rockland County Clerk with the Clerk's reply showing a Lis Pendens filed against the defendant's Rockland County property May 7, 1973. One who seeks equity should do equity. No indication was made by defendant of his financial problems and his financial statement, certified by him, (Exhibit "B is anything but revealing and shows an equity in his home which is inaccurate.

The statement, upon which plaintiff relied, was not the only inaccurate representation made. It was represented that others were with him who were to be undisclosed but were putting up the additional $50,000.00. These representations coupled with defendant Tomicki's ability to tie up the property in litigation led to the Snow acceptance of the change in contract. *

Economic and legal duress was applied to Judy Snow and not by her.

If there was any fraud or economic duress herein it was imposed upon Mrs. Snow. Mr. Tomicki's financial statement was ** delivered and certified to induce the Snows to accept the new contract wherein they were to receive only an additional $50,000.00 instead of the over $200,000.00 they had expected.

The statement was false and Mr. Tomicki, as a practicing attorney must have known of its impropriety.

12. Plaintiff alleges that no economic duress was imposed upon the defendant; that the agreement between the parties was requested by defendant Tomicki and that the letter of September 5th makes it clear that there was an agreement between the parties. It is respectfully submitted that the guarantee by defendant Antoinette Tomicki was volunteered by John Tomicki; that Mrs. Tomicki did not attend the closing and that the guarantee was not delivered to deponent until almost two months after the closing. Further, that the title policy had it been issued was to be in the

name of Golden Triangle Realty, Inc. and that no one knew of defendant's intention to place the title to the property in the name of his wife.

13. That because of defendant's tactics, plaintiff has fully published three times. Defendant has utilized every stalling tactic available to him including the default.

14. That plaintiff respectfully prays that the stay be set aside and the sale confirmed for the reason that the appeal was not perfected. Or, if the court holds that the stay was validly in force at the time of the sale, that the defendant be required to pay the delinquent taxes; bring the Goshen Savings Bank mortgage to a current basis and so maintain it; post a bond covering the costs and disbursements plus any deficiency in the sale which may occur; and for such other and further relief as to the court shall appear just and proper.

/s/ John F. Meehan
JOHN F. MEEHAN

Sworn to before me this 7th day
of August, 1974.

/s/ Robert W. Fink
Notary Public,

Despite the admonition, defendants proceeded in their second application, this time in proper form, on the same basic papers and received the decision now sought to be reargued.

3. In the present motion, defendants lay great stress upon two contracts signed in September. These contracts were before the court in both motions. The only difference is that now defendants allege that the contracts were signed after the closing. He refers to an exhibit utilized in the papers in the motion before Judge O'Gorman (May 24, 1974 Affidavit of John F. Meehan, Exhibit "1-A") and a letter of John F. Meehan dated September 13, 1973.

4. Under the rules of reargument, the new allegation made by defendants-- that the contracts were signed after the closing and not before, cannot be considered. Judge O'Gorman decision, following the line established by the New York State Court of Appeals renders the point moot, in any event.

5. The rules of reargument, notwithstanding, the contract was signed in the office of John F. Meehan on September 10, 1973. The office records of deponent forming part of the exhibits in the initial proceeding before Judge O'Gorman established John Tomicki's presence in the office on that day. The letter of September 13th, 1973, arose from another visit to deponent's office, the thrust of which was to make time "of the essence". Deponent handed the letter to John Tomicki who then said to deponent that the closing date therein stated did not conform to the new contracts. The correction was made by deponent, initialed by John Tomicki, who then retained the letter. An examination of defendant's Exhibit "C" reflects the change and refutes the

EXHIBIT D

[A-148]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

----------x

JUDY D. SNOW,

Plaintiff,

-against-

INDEX NO. 210/74

GOLDEN TRIANGLE REALTY, INC., JOHN T. TOMICKI, ANTOINETTE J. TOMICKI, MINARD H. WHITNALL, DONALD R. GGODKIND, EDWARD HENDERSON and FLOYD MAUKUEN,

AFFIDAVIT

Defendants.

----------x

STATE OF NEW YORK)
(SS.:
COUNTY OF ORANGE)

JOHN T. TOMICKI, being duly sworn, deposes and says:

1. That he is one of the defendants in the above entitled action and is now acting as attorney for the defendants herein and is fully familiar with the facts and circumstances.

2. By order to show cause, signed on May 22, 1974, these defendants sought to obtain an order declaring that the mortgages which are the subject of this action are void for usury. It is respectfully requested that the pleadings and exhibits of the defendants which were made in connection with the May 22, 1974 application be considered upon this application.

3. A subsequent order to show cause, dated June 20, 1974 was signed which sought to set aside the judgment and a decision was made by the Supreme Court, (Sweeny, J) on July 17, 1974. A copy of said decision is attached hereto and made part hereof as Exhibit "A". It is respectfully requested that the pleadings and exhibits of the defendants made in connection with the June 20, 1974 application be considered upon this application.

4. The plaintiff, by her attorney, has constantly maintai

EXHIBIT E

that the contracts were signed on September 10th, 1973. Deponent states the contracts were signed on September 18, 1973 after the consideration passed and the deed and mortgages signed. Deponent states that he never offered 15% interest to the plaintiff or her agent JOHN SNOW. The plaintiff and her husband, John Snow knew that deponent was obtaining new financing in order to comply with the terms of the June 12, 1973 contract. The plaintiff, by her attorney, stated that she would become the lender and set forth the terms of a proposal in the letter of John Meehan dated September 5, 1973 attached hereto as Exhibit "B". It seems inconceivable to deponent that if he in fact offered 15% interest as stated on page 3 of the affidavit of John Meehan dated May 24, 1974, that seller would offer 14% interest on the land mortgage and 12½% interest on the house mortgage.

5. Deponent wishes to direct the Courts attention to the contracts submitted as Exhibits by both the plaintiff and defendants drawing specific attention to the dates. An analysis of said Exhibits is a follows:

Plaintiff's Exhibit	Defendant's Exhibit
House and 20 acres SEPT. 10TH (Exhibit A of May 24, 1974 affidavit of John Meehan)	SEPT. 18TH (Exhibit E of May 22, 1974 affidavit of John Tomicki
94 Acres SEPT. 10TH (Exhibit B of May 24, 1974 affidavit of John Meehan)	Undated (Exhibit D of May 22, 1974 affidavit of John Tomicki

(Copies of said first pages of the Exhibits are attached hereto and marked plaintiff's Exhibits and defendant's Exhibits.)

Deponent further wishes to direct to the Court's attention that the date on the house contract as shown on Exhibit A of the affidavit of John Meehan dated May 24th, 1974 appears to have a "0" written over an "8". The first page of said exhibit is attached hereto.

Furthermore the September contract relating to the sale of the house and 10 acres contains the following phrase;

> "Purchaser represents that no broker was involved in the within sale and has executed (emphasis added) a separate agreement assuming personal responsibility to save and hold harmless seller from any obligation"

As a matter of fact the plaintiff submitted said hold harmless agreement to this Court in Exhibit 1-A attched to the May 24, 1974 additional affidavit of John Meehan. The Court will see that the date of the hold harmless agreement is September 18th, 1973. It would be impossible to have executed a contract dated September 18th, 1973 on September 10th, 1973. The contract as shown by both parties carries the language in the past tense.

6. Deponent has been searching his files for weeks to find the documentation which would clearly prove that the contracts were not executed on September 10, 1973. Attached hereto and made part hereof as Exhibit C is a copy of a letter of John F. Meehan dated September 13, 1973 addressed to defendant, John Tomicki. The thrust of that letter was to call for a closing by September 17th, 1973 or else the contract would be called in default and deponent would lose the $25,000.00 down payment. Deponent again directs the Court's attention to the September contracts set forth as Exhibits and the Court will see that a closing date of September 18th at 2:00 p.m. is set forth therein. It is inconceivable to deponent that if, as plaintiff states, contracts were signed on September 10, 1973 calling for a closing on September 18th that a letter would be written on

on September 13th, 1973 calling for a closing of September 17th and threatening a default of the contract.

7. Deponent states that no contracts were signed on September 10th, 1973. Deponent further states that Plaintiff kept pressuring for a closing or threatening a default. (See letters of John F. Meehan dated September 13th, 1973, September 5th, 1973 and August 24, 1973 with the latter attached as Exhibit D.) The decision of Judge Sweeny dated July 17, 1974 placed great emphasis on movants voluntary decision to take title in a corporate name. Deponent states that pressure was applied to the defendant John T. Tomicki. The September contracts and the assignment of said contracts were signed on September 18th, 1973 after the consideration had passed. Deponent immediately transfered title out of the corporation after the closing. If the Court would allow a full hearing on the matter, deponent believes that it can be proven to the Court that the placing of title in Golder Triangle Realty, Inc., was a device used by the plaintiff to avoid usury. Furthermore unless deponent closed in a corporate name plaintiff would have declared the contract in default and taken the downpayment.

8. If the Court will read carefully the language contained in the brokerage hold harmless agreement dated September 18th, 1973 set forth as Exhibit 1-A to the affidavit of plaintiff's attorney dated May 25, 1974, there can be no doubt that the language shows that the contract was being executed on September 18, 1973 and that personal guarantees were needed. There was no need to place title in a corporate name other than an attempt to avoid the usury laws.

9. This case is quite different from Mandeline v. Fribourg (23 NY 2d 145). The thrust of Mandelino is that no loan or forebearance be intended by the seller. The interest rate must be clearly set forth and there should be no overreaching. In the case

at bar economic duress was applied; contracts [illegible] signed with an [illegible] after the closing of the title to real property wherein title was transfered to a corp[illegible] guarantees were required; financial statements were required; there was substantial over reaching on interest (from 8½% to 14%.) Furthermore, the total price for the house and 104 acres stayed the same in the June contrac and September contracts, except for the insurance adjustments for the fire loss as set forth in Exhibit E attached hereto.

10. Deponent believes he has set forth facts which are directly apposite to the facts as stated by the plaintiff and that the default judgment should be vacated so that the defendants can have the oppertunity to prove that a usurious loan was intended and employed as part of the real estate transaction herein.

John T. Tomicki

JOHN T. TOMICKI

Sworn to before me this
30 day of July, 1974.

John J. Lee Jr

NOTARY PUBLIC

Orange Co. N.J.
My comm. expires 3/30/76

A-153

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

----------x

JUDY D. SNOW,

Plaintiff,

INDEX NO. 210/74

-against-

GOLDEN TRIANGLE REALTY, INC., JOHN T. TOMICKI, ANTOINETTE J. TOMICKI, MINARD H. WHITNALL, DONALD R. GOODKIND, EDWARD HENDERSON and FLOYD MAUKEN,

ORDER TO SHOW CAUSE

Defendants.

----------x

Returnable: Special Term of the Supreme Court, to be held at the County Government Center, in the Village of Goshen, Orange County, New York on the 9th day of August, 1974 at 9:30 a.m.

JOHN T. TOMICKI, ESQ.
Attorney for the defendants,
John T. Tomicki, Antoinette J. Tomicki
and Golden Triangle Realty, Inc.
Office & P. O. Address
Maple Avenue,
Goshen, New York 10924

JOHN F. MEEHAN, ESQ.
Attorney for the plaintiff, in opposition, if any
50 North Church Street
Goshen, New York 10924

JOHN HAYDEN, ESQ.
Foreclosure Sale Referee
252 Main Street
Goshen, New York 10924

Noticed by: JOHN T. TOMICKI
Maple Avenue
Goshen, New York 10924

Upon reading the annexed affidavit of JOHN T. TOMICKI, one of the defendants herein, duly sworn to the 30th day of July, 1974, let the plaintiff herein named show cause before the Court at a motion term hereof to be held on the ~~8th~~ 9th day of ~~September~~ August, 1974 at 9:30 a.m. at the County Government Center, Village of Goshen, New York, why, based upon the new information contained in the affidavit of John T. Tomicki, there should not be a re-argument of

EXHIBIT F

(A-154)

the previous order to show cause which sought an order

(a) setting aside the default judgment in this action;

(b) permitting the defendants, JOHN T. TOMICKI, ANTOINETTE J. TOMICKI and GOLDEN TRIANGLE REALTY, INC., to interpose an answer to the complaint;

(c) and upon service thereof, permitting summary judgment in favor of the defendants or a trial upon the issues raised therein;

(d) granting such other further and different relief as to the Court may seem just and proper.

SUFFICIENT CAUSE THEREFOR APPEARING, it is hereby

ORDERED, that service be personal delivery of a copy of this order and all supporting papers be made upon the plaintiff leaving a copy of said papers at her attorney's office and the Referee at his office, as appears herein, on or before 5:00 p.m. on the 31st day of July, 1974; and it is further

ORDERED, that pending the final determination of this application, by service upon the defendant's attorney of an order with notice of entry thereon determining this application, the plaintiff is stayed from conducting the foreclosure sale of the premises described in the mortgages on condition that defendants Tomicki post a $2,000.00 bond to be approved by a Judge of this court on or before August 6th 1974. Failure to furnish said bond on or before that date shall permit the sale to go forward

~~DENIED~~:

7-31-74 Jwd JSC.

John W. Sweeny
J.S.C.

Dated: July 31, 1974
Goshen, N.Y.

JOHN F. MEEHAN, ESQ.
Attorney for the Plaintiff
50 North Church Street
Goshen, New York 10924

A true record entered Aug 16, 1974 11:00 AM

JOHN HAYDEN, ESQ.
Foreclosure Sale Referee
252 Main Street
Goshen, New York 10924

C. N. Winters
Clerk

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF New York ss.:

Donald B. Rosenberg being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Westhcester County, New York of La

Check Applicable Box

☒ Affidavit of Service By Mail — On April 1, 19 77 deponent served the within Notice of Motion and Memorandu upon Meehan & Fink, Esqs. attorney(s) for Plaintiffs in this action, at Route 17M, P.O. Box 391, Goshen, New York the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on April 1, 1977

.....
The name signed must be printed beneath

A-156

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

RECEIVED IN CHAMBERS
OF JUDGE HENRY F. WERKER
APR 4 1977

JOHN F. MEEHAN AND ROBERT W. WINK d/b/a MEEHAN & FINK, Plaintiffs, - against - JOHN SNOW AND JUDY SNOW, Defendants.	MEMORANDUM OF LAW 75 Civ. 5891 (H.F.W.)

U.S. DISTRICT COURT
FILED
APR - 5 1977
S. D. OF N. Y.

PRELIMINARY STATEMENT

This memorandum is submitted in support of Defendants' motion to vacate and set aside a default judgment filed on March 7, 1977.

RECEIVED IN CHAMBERS
OF JUDGE HENRY F. WERKER
APR 5 1977

SUMMARY OF THE FACTS

Plaintiffs, citizens of New York, are attorneys duly authorized to practice in the courts of the State of New York. Defendants are citizens of the State of Pennsylvania. Plaintiffs allege performing professional services in the State of New York at the instance and request of the defendants between the dated December, 1973 and September, 1975, for which the alleged fair and reasonable amount due is $14,339.26 over and above

all credits. Suit was commenced in September, 1975 in the Supreme Court, Orange County, New York by service of a Summons with Notice. A Complaint was served on Defendants' attorneys on October 24, 1975, and prior to submitting an Answer, and on November 20, 1975, the action was removed to the United States District Court for the Souther District of New York by the Defendants. An Answer with Counterclaims was served on December 19, 1975.

A motion was made by Plaintiffs seeking leave to serve and file an amended Complaint to correctly allege the capacity of the Plaintiffs, to assert a pro forma allegation of performance, and to add two causes of action in behalf of the Plaintiff, John F. Meehan, for defamation by slander.

The motion was granted and an order granting leave to Plaintiffs to service an amended Company was filed on August 26, 1976.

Defendants' counsel received a copy of the amended Complaint on September 17, 1976 and served an Answer to the amended Complaint on October 8, 1976 containing counterclaims against Plaintiffs.

A Notice of Rejection was served on Defendants' counsel on October 15, 1976 returning Defendants' Answer to the amended Complant.

Plaintiffs moved to enter a default judgment which

was granted withleave given in the judgment entered to Defendant to move to set aside and vacte said judgment.

The instant motion is brought to vacate and set aside the default judgment which was based upon a ten (10) day late service of the Answer to the amended Complaint.

SUMMARY OF ARGUMENT

The default judgment was entered not on the merits but based upon late service of the answer to the amended Complaint of ten (10) days duration.

The default judgment should be vacated in the interest of justice where Defendants' demonstrate mistake, inadvertence, and excusable neglect on the part of Defendants' counsel resulting from his misunderstanding of the time within which the Answer was to be served and where Defendants' show a meritorious defense to Plaintiffs' claims where no prejudice is suffered by Plaintiffs. Any doubts should be resolved in favor of a trial on the merits and to avoid a multiplicity of separate actions.

POINT I

A MOTION TO VACATE A DEFAULT JUDGMENT IS ADDRESSED TO THE SOUND DISCRETION OF THE COURT

A motion under Rule 60(b)(1) is addressed to the sound discretion of the Courts. The general rule to be applied is

A-159

set forth in 7 Moore's Federal Practice, ¶60.22 [2] at page 247:

> "...By now, however, there is a considerable body of federal decisions dealing with 'mistake, inadvertence, surprise or excusable neglect'; and, speaking generally, these decisions have been in marked harmony with the proposition that 60(b) is a remedial rule to be liberally construed." (Cases cited)

It is further stated in the above treatise, ¶60.19 at page 232:

> "Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits." (Cases cited)

In the case of Rooks v. American Brass Co. (CA 6th, 1959) 263, F2d 166, 1 FR Serv 2d 60 b 24, Case 2 the Court states:

> "It has been declared in the Courts of Appelas that matters involving large sums of money should not be determined by default judgments if it can be reasonably avoided."

The amended Complaint and Answer claim substantial sums as damages.

The above treatise states in ¶60.22 at page 251:

> "And in reference to relief from a default judgment while the facts of a particular case may warrant a denial of the motion by the court in its exercise of a sound discretion, doubt, if any, is to be resolved in favor of a trial on the merits." (Cases cited) Tolson v Hodges (A.N.C. 1969), 411 F2d 123, Henderson 66 Sales,

A-160

Inc. v Harrison (D.C. Texas, 1973) FRD 408.

POINT II

COUNSEL'S MISTAKE AND NEGLECT RESULTING IN DEFAULT MAY BE CONSIDERED EXCUSABLE NEGLECT UNDER RULE 60(b)(1)

Excusable neglect justifying relief from a final judgment or decree may arise from mistakes of counsel. U.S. v One 1966 Chervolet Pickup Truck, (DC, Tex. 1972, 56 F.R.D. 459.)

It was further held in A. F. Dormeyer Co. v M. J. Sales & Distributing Co., (CA, Ill., 1972, 461 F2d 40) that counsel's failure to file a copy of his answer with the Clerk of the Court because of his unfamiliarity with the Court procedure was attributable to "mistake" and "excusable neglect" within Rule 60(b)(1). Albert Levine Associates, Inc. v Kershner, (DC, N.Y., 1968, F.R.D. 450), Radack v Norwegian America Line Agency, Inc. (CA, N.Y. 1963, 318 F2d 538), Minneopolis Brewing Co. v Merritt, (DC, N.D. 1956, 143 F. Supp. 146).

Counsel's late filing of the Answer was considered excusable neglect in the case of Mannke v Benjamin Moore & Co., (CA, PA, 1967, 375 F2d 281). In the instant case,

Defendants have not been negligent. Where the Defendant personally has not been negligent in the protection of his interests, the Courts have been reluctant to attribute to him the errors of his legal representatives. Barber v Turberville (CA, DC, 1954) 218 F2d 34, 20 FR Serv. 60b 24 Case 2.

POINT III

LIBERAL STANDARDS ARE APPLIED BY THE COURT IN ASSESSING DEFENDANTS' MERITORIOUS DEFENSE

It is not necessary for Defendant seeking to overturn a default judgment to establish that they will prevail on trial; it is sufficient to state defenses which, if established on trial, would defeat Plaintiffs' action. Horn v Intelectron Corp. (DC, N.Y., 1968) 294 F. Supp. 1153. There are many serious issues of fact raised in the affidavits and exhibits in support of the motion challenging Plaintiffs' rights to a recovery herein. Furthermore, Plaintiffs have flatly denied making the utterances which Plaintiffs claim were defamatory. There is no clearer defense than that. Issues of credibility and proof to be submitted by Plaintiffs' witness can only be resolved on the merits at trial. Liberal standards are to be applied by the Court in its consideration of the motion. Wagg v Hall (DC, PA, 1967), 42F.R.D. 589.

A-162

In the instant case, an original answer was served uneventfully including Defendants' counterclaims. Defendants should not be precluded from submitting proof on their counterclaim and their defenses to Plaintiffs' claim when issue was previously joined as they relate to Plaintiffs claims for professional services. It might be significant to note that Plaintiff had defects in their original Complaint which was corrected by the Court's Order granting leave to Plaintiff to file an amended Complaint. The Court's reasoning in its Memorandum Decision of August 25, 1976 emphasized the lack of prejudice to Defendants in granting the motion. Similarly, there is no showing nor assertion of prejudice to Plaintiffs in the within application.

It is respectfully submitted that all the issues should be resolved in one action on the merits.

CONCLUSION

It would be in the interest of justice to grant Defendants' motion to vacate default judgment and allow a trial on the merits.

Respectfully Submitted,

VOGEL MARKS & ROSENBERG
Attorneys for Defendants
Office and P. O. Address
477 Madison Avenue
New York, New York 10022
Tel: 212 - 758-3404

A-163

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN and ROBERT W. FINK d/b/a MEEHAN & FINK, Plaintiffs,	)	AFFIDAVIT
- against -	)	75 CIV 5891 (HFW)
JOHN SNOW and JUDY SNOW, Defendants.	)	

STATE OF NEW YORK)
COUNTY OF ORANGE) ss.:

ROBERT W. FINK, being duly sworn, deposes and says:

1. That he is one of the plaintiffs in the above entitled action, and that he makes this Affidavit in answer to defendants' motion to set aside the default and vacate the Default Judgment, a copy of which is annexed hereto and marked Exhibit "1".

2. That included in plaintiffs' answering papers are the Affidavit of John F. Meehan, and Exhibits, which Affidavit concerns itself with the particular allegations contained in the moving papers.

3. That the Snow Affidavit is concerned only with the sale of the Judy Snow property in the summer of 1974, and contains a flat denial that certain defamatory statements were made.

4. That the Snow Affidavit fails to confront a single allegation contained in plaintiffs' first cause of action, a copy of which Complaint is annexed hereto and marked Exhibit "2".

MEEHAN & FINK
ATTORNEYS AT LAW
SUITE 17M P.O. BOX 361
GOSHEN, NEW YORK 10924
(914) 294 5421

That Mr. Rosenberg, in his Affidavit, questions certain parts of the foreclousre, only one of the three areas of service alleged in the first cause of action, and his allegations are shown to be groundless by the Affidavit of John F. Meehan.

5. That the defendants' papers are devoid of any fact which shows they were damaged a single dollar, let alone the $1,500,000.00 they allege.

6. That the sale of the property in Orange County which the Snows claim was so badly mishandled closed in September, 1973. The foreclosure, from inception to consummation, took place during the entire year of 1974, and into 1975. The defense of the suit against the Snows for commissions was concluded by Judgment dismissing the Complaint in July, 1975.

Why did defendants continue to use plaintiffs' services through July, 1976 if they were so grievously wronged in September, 1973? Why did the Snows continually through the summer of 1976 adjourn a meeting with plaintiffs concerning their bill, while they, without plaintiffs' knowledge, continued to sell the last of their property in New York State? Why did the Snows wait until the plaintiffs commenced suit for services rendered to assert their claim against the plaintiffs? Why, if defendants feel they have a legitimate claim against plaintiffs for $1,500,000.00 have they prolonged this action time and time again?

Deponent would respectfully submit that the Snows simply want to get out of a bill they owe, and that they are using the processes of the Court to deter that obligation.

MEEHAN & FINK
ATTORNEYS AT LAW
RIGHTS TOWER - BOX 161
GOSHEN NEW YORK 10924
(914) 294-5421

A-165

7. That deponent would respectfully submit that the defendants have failed to raise one legitimate issue and that their motion should in all respects be denied.

ROBERT W. FINK

Sworn to before me this
15th day of April, 1977

Jean A. Kaminski

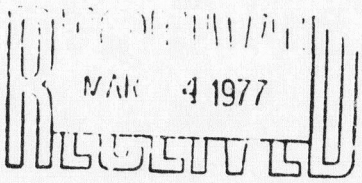
JEAN A. KAMINSKI
NOTARY PUBLIC, State of New York
Appointed in Orange County
Commission Expires March 30, 19 78

MEEHAN & FINK
ATTORNEYS AT LAW
WHITE LAKE PLAZA BOX 681
GOSHEN NEW YORK 10924
(914) 294-5421

VOGEL MARKS & ROSENBE

IA-166

JOHN F. [illegible]



UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
----------x

JOHN F. MEEHAN AND ROBERT W. FINK,
d/b/a MEEHAN & FINK,

Plaintiffs,

-against-

JOHN SNOW AND JUDY SNOW,

Defendants.

----------x

JUDGMENT

75 CIV 5891 (HFW)

The action having come on before the Court, the Honorable Henry F. Werker, District Judge, presiding, by motion for judgment upon default, and the issues having been duly considered, and a decision having been rendered,

IT IS ORDERED AND ADJUDGED

that the plaintiffs John F. Meehan and Robert W. Fink d/b/a Meehan & Fink, with a place of business located at (no number), Route 17M, Goshen, Orange County, New York, recover of the defendants John Snow and Judy Snow, residing at (street unknown), R. D. #5, Carlisle, Cumberland County, Pennsylvania, on the first cause of action, the sum of FOURTEEN THOUSAND THREE HUNDRED SIXTEEN DOLLARS FIFTY ONE CENTS ($14,316.51), with interest from the 24th day of September, 1975 in the amount of ONE THOUSAND TWO HUNDRED TWELVE ($1,212.00) DOLLARS, a sum of FIFTEEN THOUSAND FIVE HUNDRED TWENTY EIGHT DOLLARS FIFTY ONE CENTS ($15,528.51), and that the plaintiffs have execution therefore, and

Exhibit "1"

IT IS FURTHER ORDERED AND ADJUDGED

that a hearing be set to determine the damages claimed by the plaintiff John F. Meehan on the second and third causes of action, and

IT IS FURTHER ORDERED AND ADJUDGED

that the counterclaims of the defendants John Snow and Judy Snow be and the same are hereby dismissed without prejudice, and

IT IS FURTHER ORDERED AND ADJUDGED

that the defendants John Snow and Judy Snow will be given sixty (60) days from the filing of the Memorandum Decision dated February 2, 1977 in which to move to set aside their default, and

IT IS FURTHER ORDERED AND ADJUDGED

that plaintiffs are stayed from execution and enforcement of the within judgment until sixty (60) days have elapsed from the date of filing of the Memorandum Decision dated February 2, 1977 or thirty (30) days following the date of filing of the decision for defendants' motion, if timely made, to set aside defendants' default, whichever later occurs.

Dated at New York, New York the 1st day of March, 1977.

CLERK OF THE COURT

A-168

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN and ROBERT W. FINK, d/b/a MEEHAN & FINK, Plaintiffs,	)	AFFIDAVIT
- against -	)	75 CIV 5891 (HFW)
JOHN SNOW and JUDY SNOW, Defendants.	)	

STATE OF NEW YORK)
COUNTY OF ORANGE) ss.:

JOHN F. MEEHAN, being duly sworn, deposes and says:

1. That he is one of the plaintiffs in the above entitled action, and submits this Affidavit in opposition to a motion to set aside a Default Judgment entered by plaintiffs.

2. It is incumbent upon the defendants herein to establish a valid defense to the action, and this they have failed to do.

3. Mr. Snow, who directed all of the activity in the Tomicki sale, was president and sole owner of a firm known as Mech-Aer-Tronics Tool and Machine, Inc. The company experienced financial difficulties stemming from a large government contract, and Mr. Snow and his family decided to close the operation in Goshen, New York and move to Carlisle, Pennsylvania. Deponent met John Tomicki for the first time in June, 1973, and was introduced to him by Mr. Snow as a person with substantial financial backing who worked with many large investors. As a result of that meeting, a Contract was drawn wherein and

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 201
GOSHEN, NEW YORK 10924
(914) 294 5421

whereby Judy Snow agreed to sell to John Tomicki the house property in Goshen, New York for $350,000. Under the original arrangement, $25,000 was to be paid down; $275,000 to be paid in cash at the time of closing; and a second mortgage to be held by Judy Snow in the amount of $50,000. Closing was to be held August 15, 1973, with September 10, 1973 set as "time of the essence." Thereafter, and on the strength of the Contract, Mr. Snow or Mrs. Snow incurred substantial obligations in Pennsylvania in the matter of the purchase of property and establishment of a machine tool plant. Subsequently, it appeared that Mr. Tomicki was unable to obtain his primary financing. Annexed hereto and made a part hereof and marked Exhibit A is a letter from John F. Meehan to John T. Tomicki dated September 4, 1973 making clear the position on the closing on September 10 pursuant to the June contract which contained that date as being "time of the essence." At 7:00 p.m. on September 4, deponent received a call from John Snow indicating that Mr. Tomicki would be unable to close, but that he had been offered a proposition whereby Mr. Tomicki would purchase the land subject to a first mortgage held by the Goshen Savings Bank in the amount of $42,000 and that he would pay an additional $50,000 down and give mortgages back at the interest rate of 15 percent per annum. Deponent then drafted the letter of September 5, Exhibit B, annexed hereto, wherein he reduced the interest rate to 12 1/2 percent on the mortgage remaining on the house amounting to approximately $45,000, and 14 percent on the land mortgage. The reduction from 15 percent was done by deponent

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 181
GOSHEN, NEW YORK 10924
(914) 294 5421

to avoid the possibility that the rate might be deemed excessive under New York law. Deponent explained his reasons to Mr. Snow on September 6 and received his oral approval at that time. Annexed hereto and made a part hereof and marked Exhibit C is an Office Memorandum from Michael F. Patton, Esq., an attorney then employed by deponent, wherein Mr. Snow is stated to have called and discussed the 15 percent interest. The new Contracts were duly prepared and were executed by Mr. Tomicki on September 10. Deponent has no record of when Mrs. Snow signed the Contract. The closing was consummated in accordance with the letter of September 5 on September 18. Both Mr. and Mrs. Snow were present at the closing.

4. Annexed hereto and marked Exhibit D is a copy of the letter of transmittal of the Judgment Roll from the Orange County Clerk's Office of the matters on file with that office. Deponent hereinafter lists those items which are not apparent from the Judgment Roll.

(a) Formal demand and letter of acceleration mailed January 3, 1974.

(b) Service on all parties completed on or about February 12, 1974, thereafter delay based upon legal right to file an Answer before default may be entered.

(c) Sale scheduled for May 23.

(d) Order to Show Cause dated May 22, 1974 obtained by Mr. Tomicki with a stay of the sale.

(e) Hearing on stay May 28, 1974 with Briefs and testimony.

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 381
GOSHEN, NEW YORK 10924
(914) 294-9421

(f) Court directed conferences of July 31, 1974 and December 31, 1974.

5. Subsequent to the hearings in Orange County Supreme Court, there were three matters in the Appellate Division dealing with the appearance before the Hon. Arthur D. Brennan, J.S.C. the return day of the appeal and the motion for reargument.

6. Consummation of sale and delivery of deed November 26, 1974 recorded in the Orange County Clerk's Office in Liber 1995 at page 480, deed from the Referee in foreclosure to Mr. and Mrs. Snow.

7. There were approximately three or four additional contested hearings dealing with possession leading to occupancy of the premises by Mr. and Mrs. Snow.

THE FOLLOWING PARAGRAPHS DEAL SPECIFICALLY WITH THE ALLEGATIONS OF THE DEFENDANTS' AFFIDAVIT ALLEGING A CAUSE OF ACTION

8. In response to the allegation of improper advice in paragraph 5 of the Snow Affidavit, deponent was asked by the Snows whether or not Mr. Tomicki could tie up the property. Deponent indicated that it was possible, but that in his opinion, Mr. Tomicki could not succeed because of provision for the "time of the essence" limitation stated in the June 12 Contract to be September 10, 1973.

9. Reference is made in paragraph 7 of the Snow Affidavit that the letter of September 5, 1973 (Exhibit B) was unauthorized and was therefore a "breach of our attorney-client relationship . . ." The Court's attention is respectfully

IEEHAN & FINK
ATTORNEYS AT LAW
SUITE 17M P.O. BOX 191
OSHEN NEW YORK 10924
(914) 294-9421

directed to Exhibit A, the September 4th letter to Mr. Tomicki and Exhibit C, the Office Memorandum from Michael Patton, an attorney employed by deponent.

The fallaciousness of the argument is immediately apparent. First of all, defendants ratified the letter by closing in accordance with its terms on September 18, 1973. Secondly, unless deponent is alleged to have taken leave of his senses, it would be difficult to rationalize the transmittal of a letter so completely contradictory of the previous day's letter; and finally, Mr. Patton's memo of Mr. Snow's call on the 6th day of September, 1973 (it being an office record) confirms Mr. Snow's knowledge of a new arrangment calling for 15 percent interest. (See paragraph 2 infra).

Additionally, under the old arrangement the first mortgage on the Snow property of $41,500 was to be discharged. Under the new arrangement, Mr. Tomicki was to purchase subject to that mortgage. The consent of the Goshen Savings Bank had to be obtained. The bank agreed provided the interest rate, which was 6 percent on the old mortgage, was increased to 8 percent. Annexed hereto is Exhibit D-1, the bank's commitment to the change. Please note that the application is dated September 7, 1973 and the consent is dated September 17, 1973 and is signed by Mr. and Mrs. Snow. As the commitment states, no new funds were requested; in short, the Snows were prepared for the new arrangement.

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN, NEW YORK 10924
(914) 294-5421

10. As to the allegation in paragraph 8 of the Snow Affidavit, the Court's attention is respectfully directed to Exhibit B in defendants' Affidavit, wherein Mr. Tomicki, contrary

to the allegation therein contained, certified the statement involved on September 7. Respectfully, deponent never cared for Mr. Tomicki, and it was at his suggestion, contrary to the $50,000 that Mr. Snow, speaking in behalf of his wife, had determined to accept, that the payment of $75,000 in cash by Mr. Tomicki was demanded. Mr. Snow, as president of a tool and machine company, is a person with knowledge of the business world, and was urged by deponent to check the credit of the individual. The only reason that a financial statement was obtained was to ascertain whether or not Mr. Tomicki had sufficient assets. An examination of the financial statement reflected that he did not, and obviously, that he could not carry the load. It was Mr. Snow's belief that Mr. Tomicki was working for a group. Mr. Snow was familiar with another transaction, apparently entered into by Mr. Tomicki in a neighboring community, in much the same fashion as the transaction offered to him.

Mr. and Mrs. Snow were convinced that with the $75,000 paid down, they could not really suffer. Deponent was concerned with the ability of Mr. Tomicki to pay and advised Mr. Snow not to make any investments nor to commit himself in any way until the loan had become seasoned. The hardship he experienced, if such there was, stemmed from improvident investment and land speculation in Pennsylvania, coupled with the recession. Deponent's function had nothing to do with credit and, had he been given any voice in the matter, would have terminated any negotiations with Mr. Tomicki.

11. Paragraphs 9 through 12 deal with the second Contract. Deponent swore that the Contract was executed by Mr.

MEEHAN & FINK
ATTORNEYS AT LAW
WHITE PLAINS P.O. BOX 181
HUDSON, NEW YORK 12024
(914) 284 5421

Tomicki on September 10, a fact denied by him in a reargument. This matter was of little moment in any event. Mr. Tomicki's Affidavits contained many assertions, none of which were accepted by the Court. That particular issue did not avail Mr. Tomicki, nor cause any delay, and the sale was conducted on August 22.

Defendants recite the language of Judge Sweeny in paragraph 12 concerning a fraud against the Court. Deponent can only advise the Court that Mr. Tomicki was reprimanded for unethical conduct by the Hon. Arthur D. Brennan, J.S.C., while sitting in open Court in the Appellate Division, Second Department, who then disqualified himself from hearing the case; that some time thereafter, Mr. Tomicki was cited before the Appellate Division and, upon information and belief, is no longer engaged in the practice of law.

In any event, the thrust of paragraphs 9 through 12 of the Snow Affidavit deal with the delay created by allegation that the Contracts were not signed on September 10, 1973 but, in fact, on September 18, 1973. The alleged delay took the form of a motion to reargue (which motion I might note, followed every decision, including that of the Appellate Division, Second Department) wherein Mr. Tomicki alleged "new matter" which consisted of the allegation concerning the date of the signature of the Contract. Annexed hereto is a copy of Judge O'Gorman's Decision which speaks for itself (Exhibit K). But this did not delay anything for the reason that the sale publication had been commenced and was running at the time the allegation was made.

If there was damage at all, it was not damage to the Snows.

MEEHAN & FINK
ATTORNEYS AT LAW
[illegible]
GOSHEN, NEW YORK 10924
(914) 294-5421

12. All of the foregoing is an effort on the part of the defendants to some how or another impugn the integrity of deponent. For example, in paragraph 14 it is alleged that deponent handed John Tomicki a bill for $1,800. That is quite correct. Annexed hereto and marked Exhibit E is a copy of that bill, which reflects the total amount collected from Mr. Tomicki was to cover mortgage tax and filing fees.

13. As to the real estate taxes, the fiscal year for the school district concludes on June 30 of each year. The tax is payable on September 1. Deponent, as is normal in any real estate transaction, made an adjustment in favor of Mr. Tomicki since the Snows were chargeable with the tax from July 1 to September 18. Annexed hereto and made a part hereof and marked Exhibits F and F-1, are copies of the Closing Statements.

14. As to paragraph 16, even Mr. Tomicki in his wildest assertions, never suggested that the Contract as prepared had been modified. This is untrue and again, has no bearing on possible damage to defendants. As to paragraph 18, wherein it is alleged that deponent waived the defendants' right to have John Tomicki post a bond, that is not true.

15. With specific reference to paragraph 13 and the allegations which precede same, if it be presumed that the defendant is correct, on September 18, either one Contract or the other was still in force and effect. In other words, since the June Contract had contained a time of the essence clause as of

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 301
GOSHEN, NEW YORK 10924
(914) 294-5421

September 10, that clause needed to be invoked by the defendants before the Contract could have been deemed to have been terminated, and the defendants still retained $25,000, which was paid down at the time. The novation which was obviously ratified by the defendants by the execution of the instruments in accordance therewith at the September 18 closing, so that it would be difficult to perceive how defendants would have been injured thereby; deponent had obtained the signature of Mr. Tomicki as of September 10, the party to be charged. Deponent has no independent recollection of when Mrs. Snow may have signed the Contract, for the reason that the Snows were in and out of deponent's office almost every day, either in person or by telephone; and at the time, deponent was not concerned with protecting himself against his own clients, but merely attempting to conform a transaction to their express wishes.

16. Paragraph 14 of the Snow Affidavit alleges that deponent handed John Tomicki a bill for $1,800 at the closing. This is yet another blatant effort on the part of the defendants to place deponent in a bad light. It is true that deponent handed Mr. Tomicki a bill Exhibit "E" for $1,800 at the time of closing. A copy of that bill is annexed hereto and made a part hereof. As can be noted by an examination of the Exhibit, the entire bill was for disbursements. Deponent charged Mr. Tomicki $200 for preparation of the mortgages, but then extended a credit to Mr. Tomicki for the same amount as a professional courtesy. In short, deponent received nothing from Mr. Tomicki other than disbursements, which were necessary to file the mortgage in Orange County.

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN, NEW YORK 10924
(914) 294-9421

Relative to paragraph 15, annexed hereto and made a part hereof and marked Exhibits F and F-1, are the two copies of the Closing Statements. Taxes were billed to Mr. and Mrs. Snow on September 1 and should have been in fact paid by them. It is normal in our area to adjust the tax against the seller in this situation from July 1, which is the commencement of the fiscal school year, to the date of closing.

17. Paragraph 16 and 17 have been touched upon. Deponent did not alter, to his best recollection, the Contracts at the closing. Certainly that fact would have been alleged by Mr. Tomicki if he thought such an argument had any validity. As to paragraph 18, defendants' allegation that deponent waived filing a bond is again, an incorrect statement. Annexed hereto and made a part hereof and marked Exhibit G is a copy of the Affidavit of Publication for the August 22, 1974 sale. In short, deponent did not wait for the mortgagor to post bond and in cooperation with the Referee, carried out the sale on the presumption that Mr. Tomicki would not be able to file a bond on August 6 as provided in the Order of the Hon. John W. Sweeny, J.S.C. Had Mr. Tomicki posted bond, the sale would have been stayed. (See also Exhibit "G-1" annexed hereto).

18. Concerning the delay alleged in paragraph 19, the closing was held on November 26, approximately one month after the sale. Deponent is unable to understand what the point is that is being made in that paragraph since the only delay in possession were Court ordered stays. As a matter of fact, the real problem was the reluctance of our Supreme Court Judges to

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 191
GOSHEN NEW YORK 10924
(914) 294-9421

displace Mr. Tomicki and his large family around the Christmas holidays. There was nothing that deponent could do to provoke a harsher attitude in the local judges.

19. In so far as demanding security for the payment of franchise taxes, as set forth in paragraph 20, such an allegation does not appear to have been made by anyone with knowledge of real estate. I have never heard in all my years of a seller to a corporation holding security for the buyer's payment of subsequent franchise taxes. However, deponent was contacted by Mr. Snow at some time during 1976 or the latter part of 1975 wherein he informed deponent that money was being held up because of franchise taxes. Deponent then checked with the title company to ascertain the problem. He was informed by Paul Miller, Esq., Chicago Title representative in Goshen, New York, that he merely excepted franchise taxes from the title policy until his search had been completed. That at the time of the closing of whatever sale Mr. Snow had been conducting, Mr. Miller had not received his franchise tax search. He informed me that there was nothing to it, and that he did not understand why people were upset. He further stated to deponent that there were no franchise taxes due and payble which constituted a lien.

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN, NEW YORK 10924
(914) 294-5421

20. Counsel, on page 4 paragraph 8 of his Affirmation, suggests that the plaintiffs failed to cause a timely deficiency judgment to be entered within the statutory period. The Court's attention is respectfully directed to paragraph 8, page 4, of the Affidavit of John and Judy Snow, referring to the following:

> "The fact is, that there was a string of money judgments recorded with the County Clerk, Rockland County, . . ."

22. Deponent respectfully submits that there was absolutely not one word of complaint from either Mr. or Mrs. Snow concerning his conduct of the case, although it is granted that Mr. and Mrs. Snow were very impatient with the judicial process. That deponent was not a guarantor of Mr. Tomicki's financial responsibility, nor of the deal as made by Mr. and Mrs. Snow, nor did he represent himself to be in such a position. The court may also note that deponent's prosecution of the case was total and vigorous, and in the light of the contest waged by Mr. Tomicki, the completion of the foreclosure in ten months from the filing of the Lis Pendens, with hearings, special terms of court, two recorded conferences in Supreme Court, and three encounters with the Appellate Division, Second Department. Deponent cannot comprehend how he could have been expected to progress or proceed any more rapidly than was accomplished. Parenthetically, it might be noted that deponent did not take any vacation other than long weekends during the summer of 1974, nor any vacations otherwise during the period of contest, so that he could fully and completely devote himself to the total demands of the law suit.

23. That deponent would not have continued his efforts in behalf of John or Judy Snow in terms of the other litigation completed in 1975, plus certain other activities which form a part of deponent's claim, had he been aware of any dissatisfaction on the part of his client. That if the said John and Judy Snow were dissatisfied with deponent's activity as an attorney, they should

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN, NEW YORK 10924
(914) 294 9421

have come forward upon the conclusion of the foreclosure action and not waited until they had obtained other benefits before taking a position in opposition.

24. Concerning a potential buyer for the property, although I am not exactly certain of the dates, I believe that I received a call in June of 1974 from Mr. Snow indicating that a man was going to come to my office concerning an interest in purchasing the property, and instructed me to assure the gentleman that the property would be ready for sale shortly, and suggested that I prepare a contract of sale. I informed Mr. Snow that I could not make such an assertion to the gentleman, and further, that he could not enter into a contract to sell something he did not own, nor that he could with certainty, know he was going to own since the property had to be sold at public sale and would be conveyed to the highest bidder. The gentleman did come to my office and I informed him that I could not give him a certain time for possible occupancy of the property. It is my recollection that the gentleman was in a hurry to acquire property for his family no later than the 1st of August. There was no discussion of price to my knowledge, but only an interest if the property was available.

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 181
GOSHEN, NEW YORK 10924
(914) 294-5421

25. Finally, and annexed hereto, is a letter from Mr. Snow dated July 28, 1974, Exhibit "J". This letter is included to demonstrate Mr. Snow's general attitude in dealing with an attorney; to, in effect, controvert the thread of total reliance

alleged upon the deponent running through all of the papers submitted by the defendant Mr. and Mrs. Snow relied on no one any more than they absolutely had to. Deponent's only function was to carry out the transaction which Mr. and Mrs. Snow dictated, and, perhaps the only influence or decision that deponent took upon himself was the reduction of the interest proposed by Mr. Tomicki to Mr. Snow of 15 percent to the ultimate figures of 12 1/2 and 14 percent; that being done because deponent thought that the 15 percent might appear excessive to a court of law.

26. Counsel for the Snows, in Paragraphs 8, 9 and 10 question deponent's techniques. He suggests that a case, perhaps the Mandelino case (Mandelino v Fribourg, 23 N.Y. 2d 145) was neglected by deponent and would have stopped all litigation. The case was known to deponent (See Memorandum of Mr. Patton - Exhibit "C") and, while it was not included in deponent's brief for the reason that deponent felt two other cases on the point were decisive, deponent nevertheless did discuss the case in open court. In any event, inclusion of the case in Judge Sweeny's decision did not, as suggested by counsel, deter Mr. Tomicki from subsequent rearguments, appeals and reargument of the Appellate Court's decisions. The other points made by counsel appear to be a review of the Snow affidavit.

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 301
GOSHEN, NEW YORK 10924
(914) 294-5421

27. Deponent respectfully alleges that the average foreclosure requires a minimum of four to six months. In the Snow foreclosure, process had to be served in three states and the

actual delay by reason of all of the court appearances, the appeal and other proceedings to the date of sale was three months with the conveyance occuring one month later.

28. Defendants have not offered one iota of evidence reflecting their alleged loss. Annexed hereto, and marked Exhibit "L" is the certification of the assessor of the Town of Goshen as to the value of the Snow property on the assessment rolls of the Township as of June, 1974 at $228,000. Goshen, upon information and belief, maintains its tax rolls at 100 percent of true value. Subsequent to the transfer of title from the referee, the lands sold to Mr. Tomicki were sold in three parcels at the following prices. House property, $115,000.00; 28 acres on the southwest side of Maple Avenue, $30,000.00; 60 acres at $60,000.00. Deponent does not know whether or not any land is yet retained. However, when the $75,000.00 paid by Mr. Tomicki is added to the sale prices noted above, Mr. and Mrs. Snow realized a gross return of $280,000.00 or $52,000.00 over the indicated true value of the property.

29. Annexed hereto and marked Exhibit "M" is a copy of the original letter of inquiry addressed to the Supreme Court, Rockland County, concerning Mr. Tomicki. The original of the letter was delivered to deponent by Mr. Snow for his information and possible use. The letter is included among the exhibits to demonstrate two things. First, that Mr. Snow performed independently of your deponent; and secondly, the Court's attention is respectfully directed to Exhibit "I", the letter dated October 23, 1974,

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 181
GOSHEN NEW YORK 10924
(914) 294-5421

written subsequent to the within exhibited letter, which subsequent letter contains not one word of recrimination against the deponent and, as a matter of fact, is laudatory in its nature.

30. That, in summation, deponent would respectfully submit that the allegations of the defendants are contrived, in some instances self contradictory, and totally without merit.

JOHN F. MEEHAN

Sworn to before me this
15th day of April, 1977

Jean A Kaminski

JEAN A. KAMINSKI
NOTARY PUBLIC, State of New York
Appointed in Orange County
Commission Expires March 30, 1978

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 581
GOSHEN, NEW YORK 10924
(914) 294-5421

A-185

September 4, 1973

John T. Tomicki, Jr., Esq.
Village Square
West Nyack, New York 10994

Re: Snow to Tomicki

Dear Mr. Tomicki:

As I indicated in my previous letter to you, the matter of the fire damage will be handled by an escrow or trust fund until such point as a resolution of the differences have been reached. As we both realize the fire loss is not a material matter in the overall context of the closing.

I must be very clear with you, however, as to the September 10th date. I feel that my previous letters setting times for the closing would have bound you in the event we cared to pursue the matter. However, a default, as we both know, is not altogether a pleasant situation, and for that reason we have extended your time in accordance with your telephone discussions. However, I wish to be very clear with you, that if the transaction is not closed by September 10th the contract shall be deemed in default and my client shall, at that point, determine what his course of action will be.

Let me further clarify another point; following your discussion with me in early August, I suggested to Mr. and Mrs. Snow the possibility that you might not close, and I instructed them to make alternative plans for financing their Pennsylvania acquisitions.

Matters have now been cared for and Mr. and Mrs. Snow's problems in Pennsylvania have been resolved, though at an additional cost to them. I have assured Mr. and Mrs. Snow that there is no substantive problem confronting them in placing the property back on the market.

Very truly yours,

John F. Meehan

JFM/cr

Exhibit "A"

A-167

September 5, 1973

John T. Tomicki, Esq.
Village Square
West Nyack, New York 10995

Re: Snow to Tomicki

Dear Mr. Tomicki:

It is our understanding that you are unable to obtain financing for the purchase of the Snow property and that you are in danger of defaulting under the contract. It is not Mrs. Snow's intention to create a problem for you. However, you can appreciate the fact that your inability to come up with the all but fifty thousand dollars has created a severe problem for the Snows.

Accordingly, I believe it would be proper for us to prepare new contracts; one dealing with the house and the other with the land. It is proposed, therefore, the contracts be drawn which will reflect a $7,500 down payment for the land and a $22,500 down payment on the house. that you will pay $50,000 additionally against the house property leaving a mortgage of $45,000.

We have been advised by the Goshen Savings Bank that they will agree to permit you to assume the mortgage presently existing in the approximate amount of $42,000, with interest at 8% and with about a nineteen and one-half year amortization. Accordingly then we will have a mortgage on the land for $100,000, with interest at 14%, interest to be paid quarterly in the first two years, balance payable in ten with a fifteen year amortization schedule and principal and interest to be paid commencing the third year. On the house mortgage the rate will be 12 1/2%, two year's interest only, and the mortgage will be due and payable in eight years. That too will provide fifteen year amortization with quarterly payments of interest and commencing the third year with interest and principal.

While the house property will be separately mortgaged under the initially proposed contract, the Snows will of course require a second lien on that property to collaterally secure the note on the land.

Exhibit "B"

FA-188

September 5, 1973

Re: Snow to Tomicki

I believe that arranging the matter as set forth above will ease your burden, insure no default on your part and at the same time will permit the Snows to apply the proceeds to the home they are buying in Pennsylvania to which they previously committed themselves.

Very truly yours,

John F. Meehan

JFM:jb

"B"

[A-184]

TO: John T. Meehan DATE: September 6, 1973

FROM: Michael T. Patton RE: Snow to Tomicki

Mr. Snow called today and inquired as to whether the anticipated mortgage to be executed between Mrs. Snow and Tomicki at the rate of 15% interest per annum would violate the Usuary Law. I informed him that under the Mandelino Rule, the Court of Appeals has stated that a purchase money mortgage is not within the Usuary Law and therefor a purchase money mortgage at a rate greater than the rate allowed by laws is not void.

For your information the Court of Appeals held in Mandelino vs. Tribourg, 23 N.Y.2d 145, 295 N.Y.S.2d 654 (1968), that a purchase money mortgage in excess of the allowable rate of interest did not violate the Usuary Laws. In that case the purchaser bought a piece of property in Broolyn for $15,500.00. The purchaser made a cash payment in settlement of $1,000.00 and executed a purchase money mortgage in the amount of $14,500.00 to the seller. The mortgage on its face called for an interest rate of 7%. At the time the mortgage was executed the allowable rate of interest was 6%.

The Mandelino case presented a question of first impression since all prior cases dealing with usurious mortgages had been cases where the rate of interest shown on the face was legal but the principal amount of the mortgage had been increased to reflect a rate of interest higher than that actually charged. As noted above the Court of Appeals in Mandelino held that the normal purchase money mortgage is not within the Usuary Laws and that such laws are not violated by a purchase money mortgage which exceeds the legal rate of interest. However in Mandelino it should be noted that the rate of interest charged only exceeded the legal rate by 1%. The rate of interest which Tomicki is offering Snow is almost twice the legal rate of interest and may cause additional problems.

The penalties for violating the Usuary Laws are rather severe. General obligations Law section 5-511 provides that any loan which provides for a rate of interest in excess of the legal rate is void. This would mean that if a 15% mortgage from Tomicki to Snow were declared void, Snow would forfeit not only interest by all principal. Further Section 5-519 provides that the mortgagor need not offer to repay the loan prior to commencing a suit to have the loan declared void. Tomicki may have these sections in the back of his mind offering to pay a rate of interest which he well knows far exceeds the legal rate. It might be a safer course to provide for a higher purchase price at a rate of interest that is within the legal rate so that know questions of Usuary could arise when the time for payment arrives.

Exhibit "C"

A-190

JOHN F. MEEHAN

RECEIVED
OCT 2 1974

County of Orange

COUNTY CLERK'S OFFICE

Orange County Government Center

Goshen, New York 10924

Tel. (914) 294-5151

CHARLES N. WINTERS
County Clerk

RICHARD F. RIKER
Deputy County Clerk

October 21, 1974

Irving N. Selkin, Clerk
Appellate Division of the Supreme Court
Second Judicial Department
45 Monroe Place
Brooklyn, New York 11201

Att: Mr. Mack

Re: JUDY D. SNOW vs GOLDEN TRIANGLE REALTY, INC. &c
Supreme Court - Orange County Index No. 210/74

Dear Mr. Selkin:

Enclosed herewith is the Judgment Roll in connection with an Appeal from an Order entered in my office on August 5, 1974. The documents constituting the Judgment Roll are more fully outlined on the attached sheet.

This case has been ordered on the Appellate Division Calendar for the October, 1974 Term.

After these documents have served their purpose, will you kindly return them to me at the above address.

Very truly yours,

Charles N. Winters

CNW:cjs
Encls.
cc: John T. Tomicki, Esq.
Attorney for Defendants
Maple Avenue
Goshen, New York 10924
Tel. (914)294-7881

John F. Meehan, Esq.
Attorney for Plaintiff
50 North Church Street
Goshen, New York 10924
Tel. (914)294-5421

Exhibit "D"

A-191

JOHN F. MEEHAN
RECEIVED
OCT 24 1974

Re: JUDY D. SNOW vs GOLDEN TRIANGLE REALTY, INC. &c
Supreme Court - Orange County Index No. 210/74

1. (1-17-74) Notice of Pendency.

2. (1-17-74) Notice of Pendency.

3. (3-07-74) Notice of Motion, Affirmation, Exhibits and Judge's Decision.

4. (3-07-74) Summons, Complaint & Exhibits.

5. (3-18-74) Application for Order of Reference, Affirmation & Order.

6. (4-17-74) Judge's Decision.

7. (4-17-74) Judgment of Foreclosure.

8. (6-05-74) Reply Affidavit.

9. (6-05-74) Order to Show Cause, Affirmation & Exhibits.

10. (6-05-74) Affirmation.

11. (6-07-74) Order.

12. (6-28-74) Order to Show Cause & Judge's Decision.

13. (6-28-74) Law Memorandum.

14. (6-28-74) Law Memorandum.

15. (7-18-74) Order to Show Cause, Affirmation & Exhibits.

16. (7-18-74) Order to Show Cause.

17. (7-18-74) Affirmation & Exhibits.

18. (7-18-74) Law Memorandum.

19. (7-18-74) Law Memorandum.

20. (7-18-74) Affidavit of Service.

21. (7-18-74) Notice of Petition, Affidavit & Order.

22. (8-05-74) Notice of Settlement of Order and Order.

23. (8-05-74) Order.

A-192

JOHN F. MEEHAN
RECEIVED
OCT 24 1974

24. (8-16-74) Affiramtion.

25. (8-16-74) Law Memorandum.

26. (8-16-74) Order to Show Cause, Affidavit & Exhibits.

27. (8-20-74) Order.

28. (8-21-74) Notice of Appeal.

29. (8-21-74) Notice of Appeal.

30. (9-24-74) Notice of Appeal.

31. (9-26-74) Affidavit of Services

Very truly yours,

Charles N. Winters

CNW:cjs

A-143

GOSHEN SAVINGS BANK

DETAILS OF MORTGAGE COMMITMENT
AND DISCLOSURE STATEMENT

APPLICANT: John E. and Judy Snow

DATE OF APPLICATION: 9/7/73

PROPERTY AND LOCATION: 110-125 acre farm and usual farm buildings
R. D.#2, Maple Avenue, Goshen, N. Y.

*Balance of present mortgage with interest paid to 9/1/73

TERMS: Amount of loan $ 41,549.27* Year Term 20 years

Interest rate 8 % Monthly payment $ 348.00
Total payment including interest if mortgage runs to maturity $ 83,512.80
Annual percentage rate 8 %

APPRAISAL FEE: $ No fee due the Bank's Committee at the closing.

PREPAYMENT: First of any month in multiples of $50.00 or in full without penalty.

SEARCH/TITLE REPORT: Your Attorney will advise.

POINTS: None BROKER: None ESCALATION CLAUSE: None

OTHER: Your Attorney will quote you on Survey charges, your fees, and disbursements in this transaction. See approved bill at the closing for these charges. Except for the appraisal fee, the Bank makes no charge to you

In cases where mortgages are given by a Corporation, Officers of the Corporation must sign as such, and in addition, the principals of the Corporation must also sign as sureties on the Bond.

A copy of the Attorney's bill for services and disbursements approved by the Mortgagors shall be furnished for the Bank's files.

A copy of the Mortgage will be furnished you as promptly as practicable.

This is an existing mortgage to which no additional funds have been requested. You have asked us to accept a modification and extension agreement in accordance with the above terms.

RESCISSION: You shall have the right to rescind this transaction at any time prior to closing without obligation.

RECEIPT OF COPY OF THIS MORTGAGE COMMITMENT AND DISCLOSURE STATEMENT IS HEREBY ACKNOWLEDGED. Please date and sign below, one copy of this commitment and disclosure statement and return to the Bank in the envelope provided.

DATED: _____

_____
John E. Snow

_____
Judy Snow

Exhibit D-1

NOTICE - See other side for important information

GOSHEN SAVINGS BANK

DETAILS OF MORTGAGE COMMITMENT
AND DISCLOSURE STATEMENT

APPLICANT: John E. and Judy Snow

DATE OF APPLICATION: 9/7/73

PROPERTY AND LOCATION: 110-125 acre farm and usual farm buildings R. D.#2, Maple Avenue, Goshen, N. Y.

*Balance of present mortgage with interest paid to 9/1/73

TERMS: Amount of loan $ 41,549.27* Year Term 20 years

Interest rate 8 % Monthly payment $ 348.00

Total payment including interest if mortgage runs to maturity $ 83,512.80

Annual percentage rate 8 %

APPRAISAL FEE: $ No fee due the Bank's Committee at the closing.

PREPAYMENT: First of any month in multiples of $50.00 or in full without penalty.

SEARCH/TITLE REPORT: Your Attorney will advise.

POINTS: None PROVISO: None ESCALATION CLAUSE: None

OTHER: Your Attorney will quote you on Survey charges, your fees, and disbursements in this transaction. See approved bill at the closing for these charges. Except for the appraisal fee, the Bank makes no charge to you.

In cases where mortgages are given by a Corporation, Officers of the Corporation must sign as such, and in addition, the principals of the Corporation must also sign as sureties on the Bond.

A copy of the Attorney's bill for services and disbursements approved by the Mortgagors shall be furnished for the Bank's files.

~~xxxx

A-195

LAW OFFICES
JOHN F. MEEHAN

50 NORTH CHURCH STREET
SPOFFORD, NEW YORK 10954

AREA CODE 914
294-5421
RES 294-6734

John F. Tomicki, Jr., Esq.
Village Square
West Nyack, New York

September 18, 1973

Re: Snow to Tomicki

For Professional Services Rendered

Preparation of Mortgages	$ 200.00
Mortgage Tax	
Land.	1,413.75
House	312.50
Filing Fees	
Extension Agreement .	5.50
Two Mortgages	21.50
	$1,953.25
LESS- Attorney's Credit.	200.00
TOTAL DUE	$1,753.25

Exhibit "E"

A-196

CLOSING STATEMENT

SELLER: Judy Snow
BUYER: John T. Tomicki
DATE: September 18, 1973
TIME: 2:00 P.M.
PLACE: Office of John F. Meehan, 50 North Church Street, Goshen, New York

---

PURCHASE PRICE		$232,500.00
Less Down Payment	$ 2,500.00	
Goshen Savings Bank Mortgage	$41,549.27	
		$ 44,049.27
BALANCE		$188,450.73

ADJUSTMENTS: (as of 9/18/73)

CREDIT TO SELLER

1973 State, County and Town Tax
*Adjusted figure $479.54
4 months X $39.96 per mo. = $159.84

CREDIT TO BUYER

1973-74 School Taxes
*Adjusted figure $489.82
2 months X $40.81 per mo. = $ 81.63

Total Credit Due Seller	"	$ 78.21
		$188,528.94
Less Mortgage		$188,450.00
TOTAL CASH DUE AT CLOSING		$ 78.94

"Exhibit F"

Computed - 14% off Total Tax - then 1/3 for house and 10 acres; 2/3 for land.

A-192

CLOSING STATEMENT

SELLER: Judy Snow
BUYER: John Tomicki
DATE: September 18, 1973
TIME: 2:00 P.M.
PLACE: Office of John F. Meehan, 50 North Church St., Goshen, New York

---

PURCHASE PRICE	$117,500.00
Less Down Payment	22,500.00
BALANCE	$ 95,000.00

ADJUSTMENTS: (as of 9/18/73)

CREDIT TO SELLER:

1973 State, County and Town Taxes *Adjusted figure $239.77 4 months X $19.98 per mo.	=	$ 79.92
Oil 290 gal. @ .21 per gal.	=	60.90

CREDIT TO BUYER

1973-74 School Taxes *Adjusted figure $244.90 $20.41 X 2 months	=	$ 40.82

TOTAL CREDIT DUE SELLER	$ 100.00
TOTAL AMOUNT DUE AT CLOSING	$ 95,100.00
Less Mortgage delivered at Closing	45,000.00
TOTAL CASH AT CLOSING	$ 50,100.00

Computed - 14% off Total Tax - then 1/3 for house plus 10 acres; 2/3 for land

Exhibit F

A-198

SUPREME COURT
COUNTY OF ORAN

JUDY D. SNOW,

- agi

GOLDEN TRIAN
JOHN T. TOMICK
TOMICKI, MINAR
DONALD R. GOO
HENDERSON and
Defe

In pursuance of
duly made and ente
date the 11th d
the referee in sa
auction at the Ol
Village of Goshen,
22nd day of August,
of that day, by the
said judgment to b

BEGINNING in
Goshen to Pellets
in a corner of farr
from thence alon
Knapp N 41 deg
Middle-town-Gosh
said Knapp, thenc
23° W. 1060.4 ft
Maple Avenue to
and distances al
said C. A. Knap
S. 53 degrees 0
E. 2221.0 ft. to
center of Maple
degrees 00° W. 7
Avenue, thence al
grees 05° E. 97
Gibson, thence a
N 50 degrees 11°
leading from Ma
thence along cen
Edward Gibson N
center of said hi
N 47 degrees 52°
along lands of s
to line of lands
of said H. Book
corner of Webb Cemetery, thence along
Cemetery S 50 degrees 04' W. 161.0 ft. to a corner of
fence, thence along Webb's Cemetery N 42 degrees 52'
W. 412.4 ft. to center of Maple Avenue, thence along
Maple Avenue S 50 degrees 15' W. 543.0 ft. to beginning
and containing 122.0 acres more or less.

SUBJECT to a grant to Orange and Rockland Electric
Company date November 17, 1933 and recorded in the Orange

AFFIDAVIT OF PUBLICATION

State of New York,
County of Orange, } ss.:

Ellen Farley

being duly sworn, deposes and says that she is the Principal Clerk of the Publisher of

THE INDEPENDENT REPUBLICAN

a weekly newspaper published in the Village of Goshen, Orange County, State of New York; and that a notice of which the annexed is a true copy was published in said newspaper on the following dates:

July 24, 1974
July 31, 1974
Aug. 7, 1974
Aug 14, 1974

Ellen Farley

Sworn to before me, this 21st day of Aug 1974

Betty Jane Wright
Notary Public

BETTY JANE WRIGHT
Notary Public, State of New York
Residing in Orange County
My commission expires Mar. 30, 1975

6

Attorney,
50 North Church Street
Goshen, New York 10924
Tel. (914) 294-5421

7-24-T4

Exhibit 6

...ereofore set forth in
Judith Andrews dated
3, 1973 in the Orange
50 of Deeds at page

1 to the County of
71 and recorded the
rk's Office in Liber

tain plot, piece or
improvements there-
the Town of Goshen,
York, as more fully

northwesterly line of
ction with the south-
e lands of Judy Snow
a 32° West 445 feet
46° 29" East 992.13
grees 26° 41" East
47 degrees 52' 00"
(5) S 54 degrees 51'
e of beginning. Con-

ges as consolidated,
held by the Goshen
nge County Clerk's
page 832 and Liber
ich mortgages there
's report herein the
HUNDRED EIGHTY
EIGHTS ($41,181.83);
accurate survey may
the premises would

tions:
, now or hereafter

taxes, assessments,

ments and restric-
e same may now be

ts in possession, if

al sales agreements

of America, if any;
if any.

N, REFEREE

ICATION

ly
he is the
e the Publisher
BLICAN
illage of Goshe
d that a notic
published in sai

ly
day

Wright
y Public
T
York
nty
30, 1975

Copy of Brief submitted by Meehan & Fink on argument of Motion before Appellate Division of the Supreme Court, 2nd Dept.

POINT I

DEFENDANT HAS NOT PERFECTED THE APPEAL

In the order entered September 11, 1974 by the Appellate Division, Second Department, defendant was ordered to perfect his appeals and to serve copies of his brief upon the respondent by September 23, 1974. He has failed to perfect his appeal, by serving a notice of appeal upon respondent; he has failed to serve briefs as directed and he failed to post the bond of $2,000.00 required by the Hon. John W. Sweeny, Justice of the Supreme Court in his order dated July 31, 1974. Accordingly defendant has not properly commenced his appeal. (CPLR Section 5515.) For this court to take jurisdiction of the case an appeal must be pending before it. The deficiency in failing to serve the notice of appeal upon the plaintiff or plaintiff's attorney is jurisdictional in nature and cannot therefore be remedied. (In the matter of Motor Vehicle Accident Indemnification Corporation v Marrero, 17 N.Y.2d 342, 271 N.Y.S. 2d 193.) Respectfully, the stay should be set aside and the closing permitted to be consummated.

POINT II

DEFENDANT MUST OVERCOME THE PRESUMPTION OF REGULARITY

Appellant has offered no satisfactory explanation of his financial statement, certified by him as correct,

Exhibit 6-1

A-200

July 18, 1975

Mr. and Mrs. John Snow
R. D. #7, York Road
Carlisle, Pennsylvania 17013

Dear John and Judy:

I understand that Bob Fink spoke with John this afternoon concerning our bill; that he was curious about the fact that a deficiency was not entered. May I refresh your recollection by indicating that you, John, said there was no sense in pouring good money after bad. This was said in the presence of Judy.

What I found particularly regretable are the reports creeping back to me about the remarks which are made about my ability as an attorney. As I said to you one day, John, "All I can do is win." You are aware we also have another matter pending in the office involving Sam Conserve.

I feel that I must hear from you concerning the amount due and we'll hold an appointment open for you for 11:00 this Friday. I think it is important to both of us that you keep the appointment.

Sincerely yours,

John F. Meehan

JFM:jk

Exhibit H-1

A-201

John E. Snow
R. D. 7
Carlisle, PA 17013

August 11, 1975

John Meehan, Esq.
Meehan & Fink
Route 17M
Goshen, NY 10924

Dear John:

It is important that Judy and I take care of certain things affecting the resettlement of our children between now and 2 September. I therefore think it is appropriate that we postpone our meeting until after Labor Day. Any day after the third, and preferably in the afternoon (so that we can leave in the morning and get there in time), would be acceptable.

I had previously asked Bob for some form of an itemization regarding the bill. I therefore think some statement as to how the amounts were arrived at would be essential.

Please advise what date is acceptable.

Yours truly,

John

Exhibit
H-2

A-202

August 27, 1975

Mr. & Mrs. John Snow
R. D. #7
Carlisle, Pennsylvania

Dear John and Judy:

I checked with American Title Insurance Company about the question raised by you and it develops that the only problem that arose was the fact that Mr. Miller, who closed for the title company, did not have the franchise tax report from the State of New York.

As a point in fact there was no lien and no problem. Mr. Miller was just being careful in the face of the fact that he did not have a report at his hand.

I trust this satisfies your question in that regard.

Sincerely yours,

John F. Meehan

JFM:ddv

Exhibit
H-3

17-203

JOHN F. MEEHAN

RECEIVED
SEP 8 1975

John E. Snow
R. D. 7
Carlisle, Pennsylvania 17013

September 5, 1975

Mr. John Meehan
Meehan & Fink
Route 17M
Goshen, New York 10924

Dear John:

I received your letter in regard to the clear title. However, since you think it's not an important matter, I still want an indemnification of any potential claims or get American Title Insurance Company to release me.

In regard to our 9 September meeting, I am leaving here Sunday night to go to North Carolina and Virginia in search of some urgently needed business. We must get some orders since we're out of work. Rather than make an appointment for the 12th, we would rather make it the 16th, sometime around 11 a.m. As bad as business is, I cannot be out of the office the whole week.

I can appreciate the urgency of your problem and hope you can consider the urgency of my problem. I'm doing the very best I can with it.

Unless you change the date, I'll be there the 16th.

Very truly yours,

John

Exhibit
H-4

A-204

JOHN F. MEEHAN

RECEIVED
OCT 25 1974

John E. Snow
R. D. #7
Carlisle, Pa. 17013

October 23, 1974

Mr. John Meehan
50 North Church Street
Goshen, New York 10924

Dear John:

Pursuant to your request, I will not go to the hearing Friday. As you can appreciate, my overall concern has been our inability to seek what I feel is expedient justice from the courts, and frankly it turned my attention to making a nine-day Novena, feeling that somewhere we need appropriate consideration. So instead of going to the hearing on Friday, I'll go to Mass.

I sincerely hope and pray that your frame of mind Friday will be disposed toward the most aggressive action you can bring to bear. I feel at this point in time confident that your current legal position has resulted from your personal attention. Recounting your statement to Tomicki on the 22nd of May as you read his order, "Well, you wanted war--you are going to get war!", I am confident Friday that you will make war to end the war.

We are awaiting your analysis of the situation.

Sincerely,

John

Exhibit
"I"

A-205

28 July 74

John Meehan Esq.
N. Church ST
Goshen N.Y.

JOHN F. MEEHAN
RECEIVED
JUL 31 1974

Dear John:

It is important for me to know certain specific procedures and facts before the sale. It will be my ultimate decision to make certain judgements and decisions at the last moment and it is essential I know what exactly is involved.

1. specifically I want the referee's announcement prior to sale which involves all the terms and conditions.

2 I want some assurance that bids (if any are made) are separate and apart from the Goshen mortgage of the Sawyers bank suits.

Exhibit "J"

A-206

and are subject ~~to the~~ to the buddies bid plus the liens - I want to be clear since the bid price is understood to include what?

3. I want a financial statement on Goodkind and O'Day before the sale as it will tell me something about their position before any sale is conducted. Maybe you can get this through your head the swamp f lion.

We are now about to enter the 8th month of this mess and still the judge has not signed the final order. That property must be sold this August with out any <u>and</u> or <u>if's</u>

A-207

We are unable to carry on down here with out income from Goshen.

I personally do not think Goodkind plus the bank will bid in excess of $150,000 Since Fini did not show at the July 11th sale at the courthouse according to my informant he may no longer be in politics or interested. But we have to do some down serious work on selling this property in Goshen and the sooner we immediately have offer.

My situation is near untenable. It is a bad situation when after all this work to move from Goshen I find myself as bad off as when I started to liquidate, there is one hell of a cash crisis coming up all

AT-208

over, this I knew a year ago and tried to avoid it. Now I am caught in it.

In closing I would like a call now and then if there is any interest from potential purchasers and who they are.

I talked to Jerry Simpson and he has arranged some visits to several of their operations here and it appears something may come out of the trips. They sure have some operation down here.

See you soon.

Sincerely
John

STATE OF NEW YORK 14-209
SUPREME COURT : ORANGE COUNTY

- X

JUDY D. SNOW, :

Plaintiff, :

-against- :

GOLDEN TRIANGLE REALTY, INC., JOHN T. TOMICKI, ANTOINETTE J. TOMICKI, MINARD H. MITCHELL, DONALD R. GOODKIND, EDWARD HENDERSON and FLOYD MAKUEN, : INDEX # 10774

Defendants. :

- X

O'GORMAN, J.

In this foreclosure action, the defendant GOLDEN TRIANGLE REALTY, INC. and the defendants TOMICKI are in default. A sale of the mortgaged property is imminent. The defendants moved for an order opening the default and staying the sale. The motion came on before the Honorable John W. Sweeny, who has rendered his decision to the effect that the defendants have not established their claim that the purchase money mortgage provided for a usurious rate of interest.

Defendants have now moved for leave to reargue the said motion. While under normal circumstances such a motion would, as a matter of course, be referred to the Honorable John W. Sweeny for his determination, it has been referred to this court in view of the circumstance of the impending sale of the property, on the consent of Justice Sweeny.

The defendants, on this motion for reargument, wish to call new matter to the attention of the court. Apart from the general prohibition against injecting new matter into an application for reargument, this new matter on which defendants rely is their claim that a certain contract considered

Exhibit-A

the 10th day of September, 1973, as shown in plaintiff's exhibit "B", but rather was signed after the closing of title had taken place on the 18th day of September, 1973, as shown in defendants' exhibit "E". For this reason, it is defendants' contention that they did not have an alternative option to taking title in the name of a corporation. It is their contention that they were forced to sign the mortgage documents on that date in inverse order because they had been threatened with the loss of their down payment pursuant to a previous contract.

The papers submitted in support of the motion to reargue, which were alleged to contain evidence that the contract in question was not signed on the 10th day of September, 1973, show that defendants place principal reliance upon two documents. The first of these is a letter addressed to the defendants by the attorney for the plaintiff dated September 13, 1973. As stated in defendants' affidavit, "the thrust of that letter was to call for a closing by September 17th, 1973 or else the contract would be called in default..." Defendants state, "It is inconceivable to deponent that if, as plaintiff states, contracts were signed on September 10, 1973 calling for a closing on September 18th that a letter would be written on September 13th, 1973 calling for a closing of September 17th and threatening a default of the contract."

However, the particular letter contains the following:

"K"

> "We cannot wait any longer. I promised I would give you forty-eight hours-- I will do better than that, and advise you that we shall be 'ready, willing and able' to close on Monday, September 17th

at my office, 50 North Church Street, Goshen, New York at 10:00 A.M. As to that time and place, time shall be 'of the essence', and if you do not come to the office prepared to close we shall deem the contract in default and will re-offer the property for sale to other parties."

A reasonable interpretation of this letter is that it contemplated a closing of title and not the signing of the contract.

The second argument upon which defendants rely refers to language in the past tense typed in the contract dated September 10, 1973 (plaintiff's exhibit "B") as follows:

"Purchaser represents that no broker was involved in the within sale and has executed a separate agreement assuming personal responsibility to save and hold harmless the seller from any obligation."

This language is at most ambiguous in that it is often the practice of a draftsman to have in mind the various stages in which various documents will be signed at a contemplated future closing.

I do not find anything in the motion papers seeking reargument which in any substantial way changes the evidence which was presented to Justice Sweeny on the prior motion and on which he based his decision.

Surely, when the provisions of plaintiff's exhibit "B" were before the court, it was incumbent upon the defendants to call to the court's attention at that time that a document had in effect contained a forgery in the form of the alteration in the date. Justice Sweeny's decision finds that the defense of usury is not available to the defendants because the mortgage involved was a purchase money mortgage, so that whether or not the defendants took title in the name of a corporation or in the name of the mortgagors would not render the transaction

"K"

usurious. The court relied upon Mandelino v. Fribourg, 23 N Y 2d 145, and Del Rubio v. Duchesne, 284 App.Div. 89.

The defendants have not established that they were wrongfully compelled by the plaintiff to sign the contract in question by the mere assertion that if they failed to complete the transaction in accordance with the terms of a contract then pending, their down payment would be jeopardized (see Leben v. Nassau Savings & Loan, 40 A D 2d 830, aff'd. 34 N Y 2d 671; Oleet v. Pennsylvania Exch. Bank, 285 App.Div. 411).

For the reason that the new matters in this motion to reargue could have been but were not called to the attention of the court upon the argument of the original motion, and for the further reasons hereinabove set forth with respect to the adequacy of the proof of the alleged defenses herein, the court will, upon reargument, adhere to the original decision rendered on this motion.

Submit order.

Dated: August 14, 1974.

EDWARD M. O'GORMAN
J. S.C.

TO: JOHN F. MEEHAN, ESQ.
Attorney for Plaintiff
50 North Church Street
Goshen, New York 10924

JOHN T. TOMICKI, ESQ.
Attorney for Defendants GOLDEN TRIANGLE and TOMICKI
Maple Avenue, R. F. D. #2
Goshen, New York 10924

"K"

JOHN HAYDEN, ESQ.
Foreclosure Sale Referee
"52 Main Street
Goshen, New York 10924

A-213

I hereby certify that the assessed valuation of the lands now in the name of Tomicki, formerly Snow, are valued as follows:

Land	177,000
Buildings	51,200
	$228,200

12 1 70.71

C M Higgins
Assessor, Town of Goshen
6/21/74

Exhibit - "L"

NOTE: This certification was obtained in 1974 for utilization in Snow vs Tomicki et al. but has applicability to the case now before the Court.

A-214

August 12, 1974

Supreme Court
County of Rockland
Office of the Clerk of the Courts
New City, New York

Dear Sir:

We have been made aware of a foreclosure judgment entered against a John Tomicki of West Nyack, New York, for the foreclosure of his house. I would appreciate a record from the court which indicates when this action was initiated prior to the entry of the judgment order. Either a copy of the motion filed by the plaintiff, whom we think may be the Dime Savings of Brooklyn, or an order from the court as to when this action was stayed will suffice.

Very truly yours,

John E. Snow

John E. Snow
Box 573, Carlisle Pa. 17013

jes;ip

Dime v Tomicki et al August 16, 1974 2397/73

The records of this office indicate that a Lis Pendens was filed here on May 7, 1973.

The Judgment of Foreclosure was filed and entered on Feb. 5, 1974.

Our records do not indicate a stay of action.

AUGUST H. HANSEN
COUNTY CLERK, ROCKLAND CO.
NEW CITY, N.Y. 10956

Exhibit "M"

IA-215

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN and ROBERT W. FINK d/b/a MEEHAN & FINK, Plaintiffs,	)	
- against -	)	MEMORANDUM OF LAW
JOHN SNOW and JUDY SNOW, Defendants.	)	75 CIV 5891 (HFW)

FACTS

Plaintiffs, attorneys pro se, instituted suit in Supreme Court, Orange County, New York in September, 1975 to recover fees alleged due by defendants for services rendered. Defendants, now Pennsylvania citizens, removed the action to Federal Court. Thereafter, by leave of Court, plaintiffs amended the Complaint to include causes of action for defamation of one of the plaintiffs, John F. Meehan. An Amended Complaint was served on defendants' attorney by mail on September 15, 1976. Defendants' attorney admits failing to serve an Answer until October 8, 1976.

A motion to enter a Default Judgment was thereafter granted by the Court, with leave to defendants to set aside the default within 30 days from the filing of the Memorandum Decision, which period was thereafter extended to 60 days.

SUMMARY OF ARGUMENT

The mistake of counsel is not the type excusable under Rule 60b, especially in light of the dilatory manner in

MEEHAN & FINK
ATTORNEYS AT LAW
GOSHEN NEW YORK 10924
(914) 294 5421

which the action has been prosecuted by him. The Affidavits submitted to show a meritorious defense are deficient in that they are contradictory, unsupported by fact, and insufficient in regard to either substantiation or allegation of actual damage.

DEFENDANTS HAVE FAILED TO ALLEGE ADEQUATE GROUNDS TO EXCUSE THEIR DEFAULT

Defendants' attorney failed to timely serve an Answer to an Amended Complaint and alleged that " . . . in the flow of his hectic practice, (he) confused Federal Court practice with New York State practice by assuming that an Answer to an Amended Complaint may be served within twenty days of service . . . " However, this error was magnified by the defendants' dilatory conduct throughout the suit.

Defendants now seek relief due to mistake and excusable neglect pursuant to Rule 60(b)(1).

Ignorance or carelessness on the part of an attorney has been held an insufficient showing of the exceptional circumstances needed to obtain relief under Rule 60(b). Hoffman v Celebrezze, 8 Cir., 405 F.2d 833, 835, and cases cited therein.

The Judgment entered against the defendants dismisses their claim, however, dismissal is without prejudice. The harm suffered by defendants, if any, is therefore insignificant as to their counterclaims.

In addition, if defendants have been damaged, they are not without recourse since their attorney may be made to

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 191
GOSHEN NEW YORK 10924
(914) 294 5421

account for his handling of the case. Universal Film Exchanges, Inc. v Lust, 4 Cir., 479 F.2d 573.

DEFENDANTS HAVE FAILED TO SET FORTH A MERITORIOUS DEFENSE

Plaintiffs are suing for professional services based upon a mortgage foreclosure action, defense of a suit against defendants for commissions, and activities with regard to the Town Zoning Board; and for damages to John F. Meehan based upon defamatory statements.

Defendants, in their Affidavit, have alleged

(1) That they did not utter the defamatory words alleged, and

(2) That the sale of certain property, prior to initiation of the foreclosure sale, was mishandled.

In fact, defendants failed to allege any defense to the entire first cause of action.

Defendants' attorney has restated the plaintiffs' argument, and added certain unsupported allegations concerning one aspect of the first cause of action, the foreclosure action.

Not one dollar in damages has been substantiated by a factual statement.

Significantly, defendants continued to use plaintiffs' services, without complaint, for approximately 22 months after the sale they now complain was mishandled.

It is difficult to understand why if the plaintiffs believe they were damaged in the amount of $1,500,000, that

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P O BOX 361
GOSHEN NEW YORK 10924
(914) 294 5421

they waited until the plaintiffs sued them to bring their own suit, or why the history of this action shows nothing but delay on their part.

In short, the defendants' conduct as measured against their allegations show the allegations to be incredible, contradictory, and inconsistent with their claims.

It is universally cited that a party does not have the burden of establishing that it will prevail and that "it is sufficient to state defenses which, if established on trial, would defeat plaintiffs' actions". Boone v District of Columbia, D.C., 294 F.2d 1156, 1157. However, the actions of a petitioner must be consistent with his allegations to support an application pursuant to Rule 60(b). See generally Ackerman v United States, 340 U.S. 793, 71 S. Ct. 209 where the Court found the appellant's allegations contrary to fact.

CONCLUSION

Defendants have failed to set forth an adequate reason for default under Rule 60(b), or to allege a meritorious defense consistent with the facts.

Respectfully Submitted,

MEEHAN & FINK, ESQS.
Attorneys Pro Se
Route 17M, Box 391
Goshen, New York 10924
Tel. (914) 294-5421

MEEHAN & FINK
ATTORNEYS AT LAW
ROUTE 17M P.O. BOX 391
GOSHEN, NEW YORK 10924
(914) 294-5421

A-219

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN and ROBERT W. FINK d/b/a MEEHAN & FINK, Plaintiffs,	)	REPLY AFFIDAVIT
- against -	)	75 CIV 5891 (HFW)
JOHN SNOW and JUDY SNOW, Defendants.	)	

STATE OF PENNSYLVANIA)
COUNTY OF CUMBERLAND) ss.

JUDY SNOW and JOHN SNOW, being duly sworn, depose and say:

1. We submit this affidavit in response to the affidavit submitted by the plaintiffs to the motion to vacate the default judgment herein.

2. The opposing papers submitted by plaintiffs are so replete with errors, misleading and untrue statements, that it would be helpful to point out to this Court the facts as known to the defendants in response to the specific assertions made in plaintiff's opposing papers.

3. In the affidavit of John F. Meehan, he, time and time again, attempts to impress this Court with the fact that it was we, the defendants, who negotiated all of the terms of the contract. That is simply not the case.

4. In paragraph 3 of the Meehan affidavit, on page 2, in the middle of that page, he states that the letter dated September 4, 1973 made clear the position on the closing on September 10th pursuant to the June contract which contained that date as being "time of the essence." The fact is that the September 4 letter is conciliatory in tone and makes no statment demanding that a default will be taken unless the "time of essence" clause is complied with. Mr. Meehan does state in the September 4 letter that he confirms that the previous letters to Mr. Tomicki could bind him with respect to a default contrary to what he told the defendants. This letter was sent without knowledge of the defendants. Defendants were in Carlisle Pennsylvania from August 31, 1973 until approximately 7:00 p.m. on September 4, 1973, at which time upon their arrival at their home in Goshen, New York they received a message that John Meehan had called them. We did not reach Mr. Meehan until approximately 11:00 p.m. that night at which time he told us that Tomicki could not come up with his financing but said nothing whatsoever with regard to the letter that he had sent out that same day regarding the extension of the closing to September 10, 1973. We agreed to meet with Mr. Meehan at his office the next day on September 5, 1973 to discuss the matter. The defendants had no contact or conversation whatsoever with Mr. Tomicki at any time at Mr. Meehan's office on September 7, 1973. Certainly we received no offer, contrary to Mr. Meehan's

statements with regard to any new financing or interest rates as set forth on page 2 of John Meehan's affidavit. Mr. Tomicki never called the defendants in Carlisle since we were not able to be reached as we did not live in Carlisle at that time but were living in motels and Mr. Tomicki did not know how to reach us in any way. Any offers that were made by Mr. Tomicki were made directly to Mr. Meehan who Mr. Tomicki only and exclusively negotiated with.

5. Mr. Meehan never instructed us as he stated in the third paragraph of his September 4, 1973 letter to make alternate plans for financing our Pennsylvania acquisitions. Any extensions given to Mr. Tomicki were made unilaterally by Mr. Meehan without any consultation, consent or authorization be the defendants.

6. On September 5, 1973, we met in John Meehan's office to discuss Mr. Meehan's telephone call of the previous evening. He advised John Snow that Tomicki could not come up with the money. There was a discussion about new interest rates but only that Mr. Meehan told us that Tomicki offered 15 percent interest. We suggested that Mr. Meehan get a financial statement from Mr. Tomicki which he said he would do which Mr. Meehan said he obtained on September 7, 1973. Mr. Meehan in his earlier affidavit, set forth as an exhibit to defendant's motion, stated that he received a financial statement in July, 1973 but never made defendants aware of this nor ever discussed this with them.

7. Mr. Meehan admits that he arbitrarily set the interest rate at 12 1/2 percent, being reduced from 15 percent, because of his concern that it may be considered excessive under New York law. Mr. Meehan claims that he received an oral approval from us on September 6 to the new interest plan which is not true although he sent a letter on September 5 detailing it before ever discussing it with the defendants. This confirms, by Mr. Meehan's own statements, that he sent the September 5, 1973 letter outlining the new proposal without the authority or knowledge of the defendants in violation of the attorney-client relationship. Defendants, not being lawyers, at that time relied upon the judgment and professional opinion and competence of Mr. Meehan and were seriously misled by him.

8. Mr. Meehan's reference to the Michael Patton memorandum (Exhibit C) confirms that Mr. Meehan knew as early as September 6, 1973 that under the Mandelino case, interest rates were not applicable to purchase money mortgages. He nevertheless, failed to assert that fact early in the opposition to Tomicki's applications to vacate his default and for a stay of the foreclosure sale.

9. In reference to Mr. Meehan's September 5, 1973 letter, it was he, not defendants, that negotiated with the Goshen Savings Bank for the assumption of the defendants' first mortgage by Tomicki.

10. Mr. Meehan, at the end of paragraph 3 of his affidavit on page 3, continues to be vague about when Mrs. Snow signed the contract. He has a specific record and recollection that Mr. Tomicki signed it on September 10, 1973 but has no record with respect to the execution by Mrs. Snow. The fact is that there is no record of this because he is concealing the fact that Mrs. Snow signed it for the first time and only time on September 18, 1973 after the deed was delivered to Golden Triangle Realty, Inc., a corporation owned by John Tomicki. Paragraph 8 of Mr. Meehan's affidavit stated that he gave the opinion to Mr. Snow that Mr. Tomicki could not succeed in tying up the property because of the "time of the essence" limitation stated in the June 12th contract to be September 10, 1973. As stated earlier, the "time of the essence" clause in the June 12, 1973 contract underscores the fact that a default could have been taken against Tomicki contrary to Meehan's advice. Mr. Meehan, as a matter of fact, always told the Snows that no default should be taken of Mr. Tomicki because the property could be tied up in litigation. This was erroneous advice in light of the "time of the essence" clause in the contract. This is confirmed by John Meehan's own sworn statement in his affidavit annexed to the moving papers as an Exhibit herein on page 9 at the end of the first paragraph which states as follows: "These representations coupled with defendant Tomicki's

ability to tie up the property in litigation led to the Snow acceptance of the change in contract." This directly contradicts Mr. Meehan's statements to the contrary in opposition to this motion.

11. Contrary to Mr. Meehan's assertions on page 5 of his affidavit, defendant had no knowledge of any specific interest rate and arrangements which were set forth in the ultimate transaction and closing on September 18, 1973. All of these were negotiated directly between Mr. Tomicki and Mr. Meehan and further evidenced the pattern of direct dealing outside the presence or knowledge of the defendants with regard to the substance of this transaction with Mr. Tomicki.

12. As stated earlier, Mr. Meehan admitted that he received Mr. Tomicki's financial statements sometime in July, 1973 which is not contradicted by him on page 6 of his affidavit. Mr. Meehan kept assuring the defendants that because Mr. Tomicki was an attorney, he would never make a false financial statement and lured the defendants into a false sense of security with regard to his veracity. Mr. Meehan even admitted the fact that he was concerned about the fact that Mr. Tomicki showed very little assets on his financial statement and nevertheless advised the Snows to go ahead with the deal. On page 8 of defendants' Exhibit C in their supporting papers to this motion, John Meehan, by his own sworn statement, admits that there was a lis pendens filed against

John Tomicki's Rockland County property on May 7, 1973. Nevertheless, no inquiry was made by Mr. Meehan of the veracity of the financing statement given by Mr. Tomicki on September 7, 1973 contrary to his professional obligations. It would seem to the defendants that this was such a significant point that if an attorney advises a client not to proceed into a deal because he feels that the financial statement given by the purchaser is insufficient, certainly a letter would have been written by Mr. Meehan, or at least a memorandum in his file would reflect that position as having been advised to his client on the record. None is found nor exists because it simply was not done.

13. Again, on page 6 of Mr. Meehan's affidavit and the last paragraph of his paragraph 10, he switches his position from an early one by stating that any hardship experienced by the defendant was based upon "improvident investment in land speculation in Pennsylvania, coupled with the recession." This is directly contradicted by Mr. Meehan's sworn statement in Exhibit C of defendants' moving papers wherein Mr. Meehan states that there was extreme economic duress and stress suffered by defendants as a result of Mr. Tomicki's delays.

14. Mr. Meehan admits in colloquy with Judge John W. Sweeny of Supreme Court, Orange County, on July 31 that Mr. Tomicki came to his office on September 7th and discussed the contract and "that he had previously furnished me with a financial statement..." (paragraph C, Exhibit A annexed).

15. Paragraph 13 of Mr. Meehan's affidavit refers to the

closing exhibits as exhibits to the papers in opposition to this motion. Even on those closing statements, the buyer is set forth as John Tomicki and not Golden Triangle Realty, Inc.

16. In paragraph 16 of Mr. Meehan's affidavit he refers to a charge to Mr. Tomicki of $200 credited for purposes of professional courtesy. If the actual grantee was a corporation, and not Mr. Tomicki individually, why should such professional courtesy have been expended? This is inconsistent with Mr. Meehan's previous statements that he had no faith, nor did he like Mr. Tomicki in his dealings with him.

17. Paragraph 17 of Mr. Meehan's affidavit contains a dramatic statement as follows: "Deponent did not alter, to his best recollection, the contracts at the closing." It is incomprehensible to defendants that an attorney at law would not emphatically deny the fact that he did not alter a legal instrument and only qualifies it by saying "to his best recollection." This is not a denial but an equivocal, qualified, hedged response.

18. Paragraph 20 of Mr. Meehan's affidavit confirms again the fact that Mr. Meehan was well aware of Mr. Tomicki's desperate financial condition and nevertheless did not advise the defendants of that at the time he received his financial statement on September 7, 1973, which in Mr. Meehan's sworn statements in the litigation was the basis upon which Mr. Snow and Mrs. Snow went ahead with the new deal. The fact that Mr. Meehan knew or should have known about all of the previous obligations that Mr. Tomicki had is evidenced by the record in the Rockland County Clerk's Office.

Nevertheless he failed to convey this to us or advise us of Mr. Tomicki's financial difficulties prior to recommending the new deal.

19. Mr. Meehan refused and failed to disclose to the defendants essential information which he had knowledge of well before the contracts of sale were entered into for the closing on September 18, 1973. This is a dramatic breach of his professional responsibility to defendants. The gratuitous statement that a deficiency judgment would have been uncollectible is not for him to say. It is his responsibility as an attorney to take the necessary legal steps to protect the interests of his client and not make judgments about potential uncollectibility of a deficiency judgment.

20. Contrary to Mr. Meehan's statements in paragraph 21 of his affidavit, the defendants did not use Mr. Meehan's services after the foreclosure action was terminated. It took until February, 1975 for the defendants to have the foreclosure sale confirmed.

21. The defendants kept pressing Mr. Meehan for information and telephoned him constantly regarding their upset and annoyance at the manner in which he was conducting the litigation.

22. The defendants kept asking Mr. Meehan for a bill but they were told that this was the least of our worries and he kept avoiding the presentation of a bill. Defendants sought other counsel during this period in dissatisfaction with plaintiff's services contrary to plaintiff's statments. As a matter of fact,

defendants frequently advised Mr. Meehan by telephone of their frustrations about the delays in consummating the foreclosure sale.

23. Relating to paragraph 24 of Mr. Meehan's affidavit, a Mr. Marciano did in fact come to Mr. Meehan's office with a check for a downpayment and a commitment from the Federal Land Bank to buy our property. If not for the delays occasioned by Mr. Meehan's professional services, we would have transacted a sale of the property to that potential purchaser.

24. Paragraph 28 of Mr. Meehan's affidavit, as we understand the issues on this motion, are not relevant to whether or not defendants have a meritorious defense. The question of damages relates to defendant's counterclaims which are not in issue on this motion. The issue as defendants understand it, is the professional quality of the services rendered by plaintiffs forming the basis of their allegations for professional charges asserted in the complaint. In addition, defendants have flatly denied the allegations of the second and third causes of action in the nature of defamation. This squarely puts in issue a triable issue of fact with regard to the alleged slanderous statements made by defendants. In fact, however, defendants suffered grievous losses as a result of the ultimate and protracted delays in the reposession of defendant's property.

25. Paragraph 29 of Mr. Meehan's affidavit confirms the fact that when it became necessary to defend against Tomicki's constant applications, Mr. Meehan did not get the material necessary to do

so by obtaining information to demonstrate that Mr. Tomicki's financial statement was fraudulent. Defendant took it upon himself to obtain the information from the Rockland County Clerk which Mr. Meehan could and should have done immediately after the financial statement was received by Mr. Meehan.

26. Defendant refers the Court to his letter of August, 1975 which is not exactly laudatory in tone and very specific in defendant's criticism of plaintiff's professional services.

27. It is deponent's belief that the affidavit submitted in opposition to this motion only points up various errors which are sharply disputed between the parties. Defendants urge the Court to allow them the opportunity to demonstrate the many factual areas of proof which will be successful in resisting the allegations of plaintiffs in their complaint and form the basis of a judgment on defendants' counterclaim.

John Snow
JOHN SNOW

Judy Snow
JUDY SNOW

Sworn to before me this 18th
day of May, 1977

Janine R. Ullom

JANINE R. ULLOM, NOTARY PUBLIC
SILVER SPRING TOWNSHIP
CUMBERLAND COUNTY
MY COMMISSION EXPIRES MAY 24, 1979

A-280

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN and ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs,

Index No. 75 CIV 5891
(HFW)

- against -

JOHN SNOW and JUDY SNOW,

Defendants.

AFFIRMATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

DONALD B. ROSENBERG, an attorney at law, hereby affirms under penalties of perjury as follows:

1. That your affirmant is a member of the firm of Vogel Marks & Rosenberg, attorneys for the defendants in the above action, and am fully familiar with the facts hereinafter set forth.

2. The assertions set forth in the supporting papers to the motion and the reply affidavit of defendants in this case amply sustain defendant's burden of proof in the showing of a meritorious defense under Rule 60(b). The issue of excusable neglect has been fully discussed in defendants moving papers and the memorandum of law submitted herein.

3. Defendant's reply affidavit challenges the assertions of the affidavits in opposition to this motion on the many factual issues discussed. It is not necessary to litigate in depth on papers that attempt to resolve the many conflicts raised by the

factual issues set forth in the opposing and supporting affidavits. Your affirmant respectfully submits that there has been an ample showing of a meritorious defense on behalf of the defendants. In this case, we have a complex web of ongoing acts and failures to act on the part of the plaintiffs in their professional representation of defendants. Upon the trial herein, a full and detailed evidentiary showing can and will be made.

4. Although plaintiffs state in their opposing affidavit that there is a simple denial of the causes of action lying in defamation, affiant does not know of any other method by which issue can be joined in demonstrating a meritorious defense except that those alleged slanderous statements were never made by defendants. That squarely puts into issue the fact and the credibility of the respective witnesses upon the trial.

5. Defendants are fully prepared to offer proof to sustain their burden of proof on the counterclaims asserted in their answer, but that, it is respectfully submitted, is not in issue in this motion but only the showing of a meritorious defense to plaintiff's complaint.

6. Notwithstanding any of the assertions contained in the voluminous affidavits in opposition to the within motion, the crux of the issues on this motion is the showing of a meritorious defense by defendants to the extent that if they are sustained upon the submission of supporting proof upon trial, a verdict can

be brought in defendant's favor. Certainly if a jury does not believe plaintiff's assertions with regard to slanderous statements alleged to have been made by defendants, a verdict will be entered in favor of defendants. Similarly, if it can be shown, as indicated in the supporting affidavits in support of this motion and in the reply affidavits herein, that defendants breached their professional obligations to perform legal professional services consistent with the standards of the profession in the community wherein they were performed, then a verdict may be entered in favor of defendants in this action.

7. The actions of defendants, in structuring the real estate deal, in not adequately pursuing information easily obtainable regarding the financial capacity of Mr. Tomicki, the whole question relative to interest rates and the date, execution and/drafting of the contract, together with all of the other matters more fully set forth in defendant's papers in support of this motion, clearly demonstrate meritorious defenses to this action.

8. Whether or not defendants chose to continue the services of plaintiffs after breaches as set forth in the papers, is not relevant to this motion. There are many reasons why defendants chose at that time not to abort their relationship with plaintiffs, and it cannot reasonably be construed as being a condonation or ratification of their actions. Defendants did, in fact, consult with other attorneys during the continuation of plaintiff's services regarding the manner in which plaintiff was executing

their responsibilities.

9. All three causes of action in plaintiff's amended complaint are being resisted by defendants.

10. There seems to be little doubt but that plaintiffs caused inordinate delay in the prosecution to a conclusion of the foreclosure sale of defendants' property because of their professional mishandling of the draft of the original contracts of sale, not declaring Mr. Tomicki in default of the June 12, 1973 contract and their subsequent professional mismanagement of the terms of the drafting and execution of a subsequent contract of sale which were executed simultaneously with the title closing on September 18, 1973. This gave Mr. Tomicki more than sufficient color of right in asserting the claims in support of his continuous applications for a stay of the foreclosure sale and to vacate his default in pleading.

11. No motion was made for summary judgment by plaintiffs to cut off Mr. Tomicki's continuous applications. The fact is that the Orange County Supreme Court continuously granted stays of the foreclosure sale and heard the relative rights between the respective parties at that time. It is not sufficient for plaintiffs to assert that they ultimately won each of the applications. This in no way mitigates or supports the fact that considerable delay was occasioned by Mr. Tomicki's applications which were a direct outgrowth of substantive assertions based upon plaintiffs' active participation within their professional scope of services

on behalf of defendants.

12. The simple fact is that had plaintiffs drafted an uneventful contract of sale with Mr. Tomicki's corporation as a corporate purchaser, with appropriate interest rates at the inception, and closed title thereon, there would not have been any assertable rights presented to Mr. Tomicki as were set forth in his applications for a stay and to vacate his default.

13. The Orange County Supreme Court recognized the patently reasonable assertions of Mr. Tomicki in its colloquy of July 31, 1974 by setting the matter down for a hearing on the facts thereon which was never concluded.

14. It should be sufficient to state that had plaintiffs followed the advice of their own law clerk, Michael Patton, in his memorandum to his employer, perhaps Mr. Tomicki would not have had the edge in his assertions that he did in fact have. There are sharp issues of fact which are drawn by the conflicting statements of exactly what happened as reflected in Mr. Meehan's affidavit and the defendant's affidavits. These can only be resolved by a trial of the issues.

15. The thrust of Mr. Meehan's affidavit in opposition to this motion is that all of the substantive business judgments throughout the transactions with Mr. Tomicki were made by him and not Mr. Meehan. This is rebutted by defendants' position as set

forth in their supporting affidavits, and Meehan's sworn statements.

16. Mr. Meehan's characterizations in paragraph 12 of his affidavit of defendants' motives are improper and unsupported. This is the first time that defendants were aware of the substance of this $1,800 bill. It was never disclosed prior to this affidavit by Mr. Meehan that the facts as set forth were the case. This in fact was a secretive transaction between Mr. Meehan and Mr. Tomicki and the defendants were never aware of that bill.

17. Defendants are prepared to offer detailed testimony with regard to all of these points and assert these defenses to demonstrate to this Court that the defenses are genuine and certainly have merit.

18. For all of the above reasons, and in the interest of justice, balancing the equities hereto and being mindful of the Court's desire to have an adjudication of these matters on the merits, it is respectfully submitted that defendants have amply met their burden of proof in their showing upon this motion in demonstrating excusable neglect and showing a meritorious defense excusing their default in pleading of 10 days duration.

WHEREFORE, your affirmant respectfully requests that the motion be granted in all respects and that defendants be granted leave to file and serve their answer to the amended complaint and to proceed to complete discovery proceedings in the form of the answer to interrogatories already prepared and for such other and

further relief as the Court deems proper in the premises.

Dated: New York, New York
May 24, 1977

DONALD B. ROSENBERG

THE COURT: So there is no question about calling on the telephone, you were there?

MR. TOMICKI: I was there, Your Honor.

THE COURT: In fact you signed it?

MR. TOMICKI: I signed it, Your Honor.

THE COURT: And so did the plaintiff. All right, anything else you want to tell the Court at this time, either one of you?

MR. MEEHAN: If it please the Court, one other item, Mr. Tomicki was in my office on the 7th of September and had discussed this contract with the conveyance to be into Golden Triangle. He had previously furnished me with a financial statement wherein he listed Golden Triangle, and he signed it certified to be correct on September 7th when he was in the office because at that point that was when we had discussed this contract, and he showed Golden Triangle Realty with $25,000 which he represented to me to be the down payment that he had made on the property, and that the property was going to be taken in the corporate name. To my knowledge there was never any other intention on his part. If you would like this for your record?

MR. TOMICKI: It's already Exhibit "A" an exhibit and already

A-238

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Barbara Oleksak being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Forest Hills, Queens, New York

Check Applicable Box

☒ Affidavit of Service By Mail — On May 24, 19 77 deponent served the within Reply Affidavits upon Meehan & Fink, Esqs., attorney(s) for plaintiffs in this action, at Route 17M, Post Office Box 391, Goshen, New York 10924 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — ~~xxxxxxxxxx~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on May 24, 19 77

DONALD B. ROSENBERG
Notary Public, State of New York
No. 60-3350430
Qualified in Westchester County
Commission Expires March 30, 1978

Barbara Oleksak
The name signed must be printed beneath
Barbara Oleksak

A-239

6/22/77

COPY

U.S. DISTRICT COURT
FILED
JUL 22 1977
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MEEHAN & FINK, ESQS. :

Plaintiff, :

- against - :

JOHN SNOW and JUDY SNOW, :

Defendants. :

----------x

MEMORANDUM DECISION

75 Civ. 5891 (HFW)

Opinion

#41203

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

Defendants have moved under Rule 60(b)(1) to set aside a default judgment entered in February, 1977.

In September, 1975 plaintiff, attorneys appearing pro se, began an action in the Supreme Court, Orange County, to collect fees allegedly owed them in connection with their representation of the defendants in the sale of defendants' home and in foreclosure litigation which flowed from that sale.

In November 1975, defendants removed the action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1446 (Supp. IV 1974). Defendants' answer, containing counterclaims charging plaintiffs with negligence and dereliction of duties, was duly filed in December, 1975. In August, 1976, this Court granted plaintiffs' motion to amend their complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

When defendants failed to answer the amended complaint within the time permitted by the Federal Rules, plaintiffs moved to enter a default judgment pursuant to Rule 55(b)(2), Fed. R. Civ. P. In February, 1977 that motion was

granted with leave given to the defendants to move to set aside the default under Rule 60(b)(1).

Defendants' motion is denied.

A defaulting party is not entitled to relief from a default judgment as a matter of right. To be eligible for relief under Rule 60(b), the defendant must assert facts which demonstrate that there was a good reason for the default and that there exists a meritorious defense to plaintiff's claims. Aberson v. Glassman, 70 F.R.D. 683 (S.D.N.Y. 1976). Defendant has failed to sustain its burden. Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970).

Rule 60(b) is remedial in nature and application of it is within the sound discretion of the court. International Controls Corp. v. Vesco, No. 76-7580 (2d Cir. June 3, 1977); Torockio v. Chamberlain Mfg. Co., 56 F.R.D. 82 (W.D. Pa. 1972); Cox v. Trans World Airlines, Inc., 20 F.R.D. 298 (W.D. Mo. 1957). The court's discretion, however, is not absolute nor should it be exercised in an arbitrary or capricious manner. "It must rather be so applied as to give effect, 'not . . . to the will of the judge, but to that of the law.' " Ledwith v. Storkan, 2 F.R.D. 539, 541 (D. Neb. 1942) quoting Tripp v. Cook, 26 Wend. 143, 152 (N.Y. 1841). So while there is a broad area within which a judge may properly exercise his authority, it would be an abuse of discretion to vacate a default judgment where the moving party shows no ground therefor, Western Union Telegraph Co. v. Dismang, 106 F.2d 362 (10th Cir. 1939), and, "[t]he burden is . . . upon the moving party to persuade the court that justice requires an exercise of remedial discretion in its behalf." Kowall v. United States, 53 F.R.D. 211, 216 (W.D. Mich. 1971).

While Rule 60(b) should be construed liberally with a view towards securing justice between litigants, it is nevertheless desirable that a final disposition not be casually disturbed. And although it is preferrable to dispose of

cases on the merits, this must be balanced against judicial economy and expediency. Frank v. New Amsterdam Casualty Co., 27 F.R.D. 258 (E.D. Pa. 1961). Since Rule 60(b) allows for extraordinary relief it should be granted only upon a showing of exceptional circumstances. Hoffman v. Celebrezze, 405 F.2d 833 (8th Cir. 1969); Torockio, v. Chamberlain Mfg. Co.

Rule 60(b)(1) states that "the court may relieve a party or his legal representative from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ." Rule 60(b)(1), Fed. R. Civ. P. (emphasis added). Defendants' attorney in his affidavit in support of this motion states that he confused federal court practice with state court practice. While his mistake may have been an honest one made in good faith, it is not "excusable neglect" as contemplated by the Federal Rules. Carelessness in pleading and ignorance of the rules of procedure are not synonymous with inadvertence or excusable neglect. Hoffman v. Celebrezze; Nugent v. Yellow Cab Co., 295 F.2d 794 (7th Cir. 1961), cert. denied, 369 U.S. 828 (1962); Hulson v. Atchison, T. & S. F. Ry. Co., 289 F.2d 726 (7th Cir.), cert. denied, 368 U.S. 835 (1961); In re Wright, 247 F. Supp. 648 (E.D. Mo. 1965). Were defendant's negligence to be permitted with impunity, the standards of the profession and the orderly administration of justice for which the Rules were designed would be undermined. Nelson v. Coleman, 41 F.R.D. 7 (D.S.C. 1966).

Counsel implies that involvement in his hectic practice in some way contributed to his confusion. Although a default would be understandable were counsel continuously preoccupied, for example, with the trial of a first degree murder case, Ledwith, 2 F.R.D. at 544, without a satisfactory explanation of the demands of that practice, this court has no basis upon which to determine if they were so urgent or of such duration as to excuse counsel's neglect.

Defendants' counsel also maintains that he is essentially a state court practitioner. Yet it was on his own motion that this action was removed to federal court. In Henry v. Metropolitan Life Ins. Co., 3 F.R.D. 142, 144 (W.D. Va. 1942), the court admonished that "[h]aving been given the privilege of removing their cases to this court, they [defendants] should be particualrly diligent in their compliance with the rules of this court." Had counsel been diligent, he would have readily discovered the time within which his answer was required.

Finally, defendants' counsel contends that since defendants were not themselves negligent, this court should not attribute the errors of their counsel to them. Although some courts have expressed sympathy for litigants in plaintiffs' position, such sumpathy must not supplant the generally accepted principle of imputing the negligence of an attorney to his client. Ledwith, 2 F.R.D. at 544. "Courts must conduct their business with lawyers and . . . knowledge of an attorney regarding a legal proceeding is . . . imputed to his client. Having voluntarily chosen his attorney, the defendant cannot now avoid the consequences of the acts or omissions of his freely selected agent." Aberson, 70 F.R.D. at 684.

Counsel for defendants having failed to carry his burden of proof with respect to that branch of the Rule 60(b) standard which requires a demonstration of a good reason for the default, it is unnecessary for the court to address whether or not the defendants have asserted a meritorious defense to the action.

For the reasons stated, defendants' motion is denied.

SO ORDERED.

DATED: New York, New York

July 20, 1977

Henry F. Werker

U.S. D. J.

APPEARANCES:

Plaintiffs Pro Se:

MEEHAN & FINK
Route 17M, Post Office Box 391
Goshen, New York 10924

Attorneys for Defendants:

VOGEL MARKS & ROSENBERG
477 Madison Avenue
New York, New York 10022

A-244

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OCT 14 1977
S.D. OF N.Y.

JOHN F. MEEHAN AND ROBERT W. FINK, d/b/a MEEHAN & FINK,	:	
Plaintiffs,	:	
- against -	:	ORDER
JOHN SNOW AND JUDY SNOW,	:	AMENDING JUDGMENT
Defendants.	:	75 Civ. 5541

HENRY F. WERKER, D. J.

It is hereby ORDERED that the last paragraph of the default judgment entered March 8, 1977 be amended to read as follows:

It is FURTHER ORDERED AND ADJUDGED that plaintiffs are stayed from causing execution and enforcement of the within judgment until thirty (30) days following entry of a final judgment to be entered on the second and third causes of action.

SO ORDERED.

DATED: New York, New York
October 14, 1977

Henry F. Werker
U. S. D. J.

OCT 14 1977

TA-245

Lowe, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN F. MEEHAN and ROBERT W. FINK,
d/b/a 'MEEHAN & FINK,

Plaintiffs,

-against-

JOHN SNOW AND JUDY SNOW,

Defendants.

75 Civ. 5891 (MJL)

JUDGMENT

#80,1104

This action having come on before the Court, the Honorable Henry F. Werker, District Judge, presiding, by motion for judgment upon default, and the issues having been duly considered, and a decision having been rendered, and a judgment having been entered on the first cause of action for attorneys' fees due and owing, and the second and third causes of action for defamation having been submitted to Magistrate Harold Raby for determination of the damages resulting therefrom; and the Report and Recommendation of said Magistrate having been submitted to the Honorable Mary Johnson Lowe, District Judge, for confirmation and this Court having modified said Magistrate's Report and Recommendation by its Memorandum Opinion and Order, dated June 17, 1980,[1/]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff, John F. Meehan, recover of defendant Judy Snow,

1/ As amended by the Order of this Court dated Setpember 5, 1980.

A-246

the sum of ONE THOUSAND DOLLARS ($1,000.00) with interest from June 17, 1980,[2] at 6 %, or the sum of 16.68 ($ 16.68),[3] resulting in the total sum of $ 1,016.68 ($ 1,016.68;[4]

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED

that plaintiff John F. Meehan, recover of defendant John Snow, the sum of ONE THOUSAND DOLLARS ($1,000.00) with interest from June 17, 1980, at 6 %, or the sum of 16.68 ($ 16.68),[5] resulting in the total sum of $ 1,016.68 ($ 1,016.68).[6]

Dated: New York, New York
the 22 day of September, 1980

Mary Johnson Lowe
United States District Judge

Judgment Entered: 9/24/80

Raymond F. Burghardt
Clerk of the Court

2/ Insofar as the parties in this action have indicated to this Court that they are in disagreement as to the allowance of interest, this Court hereby makes the following determinations: It must look to the state law to determine the question in a diversity action arising under New York law. See, e.g., Lee v. Joseph E. Seagram & Sons, Inc., 592 F.2d 39, 41-42 (2d Cir. 1979). Section 5001 of the N.Y. C.P.L.R. provides that "[i]nterest shall be recovered upon a sum awarded because of breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property... ." The New York State Court of Appeals has interpreted this provision as allowing interest from the date the action of an intentional tort accrued, but has noted that interest in actions involving negligent injury to property must be left to the trier of facts. De Long Corporation v. Morrison-Knudsen Company, 14 N.Y.2d 346, 348, 251 N.Y.S.2d 657, 659-660 (1964). This Court found in the above-mentioned Memorandum Opinion and Order that there was no evidence of intentional malice to justify punitive damages; accordingly, § 5002 applies here in that it provides that "[i]nterest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment." See 5 Weinstein-Korn-Miller's New York Civil Practice ¶ 5001.10, at 50-29 (1979 Supp.), citing Rupert v. Sellers, 65 A.D.2d 473, 411 N.Y.S.2d 75 (4th Dept. 1978) (concurring opinion), stating that "[i]nterest from the date of injury or accrual is not available in a libel action, only from the date of the verdict."

3/ - 6/ These blanks are to be completed by the clerk of the court in accordance with N.Y. C.P.L.R. § 5002, providing that "[t]he amount of interest [from the date of decision to the date of the entry of final judgment] shall be computed by the clerk of the court and included in the judgment."

A-247

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------X

JOHN F. MEEHAN and ROBERT W. FINK,
d/b/a MEEHAN & FINK,

Plaintiffs,

-against-

JOHN SNOW and JUDY SNOW,

Defendants.

----------X

NOTICE OF APPEAL

75 CIV 5891 (MJL)

NOTICE IS HEREBY GIVEN that JOHN SNOW and JUDY SNOW, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Final Judgment on Default filed in this action on March 7, 1977, as amended by the Order of Judge HENRY F. WERKER, filed in this action on October 14, 1977 and from the whole of said Judgment.

Dated: New York, New York
October 21, 1980

VOGEL & ROSENBERG

By: _____
Donald B. Rosenberg
A Member of the Firm
Attorneys for Defendants
Office and Post Office Address
41 East 42 Street
New York, New York 10017
(212) 599-3337

To: McCANN, AHERN & SOMMERS, P.C.
Attorneys for Plaintiffs
347 Fullerton Avenue
P.O. Box 2335
Newburgh, N.Y. 12550
(914) 561-9400

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated:

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

.....

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF NEW YORK ss:

Iola Calabrese being sworn says: I am not a party to the action, am over 18 years of age and reside at New York County, New York

On October 21, 1980, I served a true copy of the annexed Notice of Appeal in the following manner:

☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

McCann, Ahern & Sommers, P.C., 347 Fullerton Ave., P.O. Box 2335, Newburgh, N.Y. 12550, atty. for plaintiffs

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on October 21, 1980

DONALD B. ROSENBERG
Notary Public, State of New York
No. 60-3350430
Qualified in Westchester County
Commission Expires March 30, 1981

S/
.....
(Print signer's name below signature)

Iola Calabrese

A-249

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------X

JOHN F. MEEHAN and ROBERT W. FINK,
d/b/a MEEHAN & FINK,

Plaintiffs,

-against-

JOHN SNOW and JUDY SNOW,

Defendants.

----------X

NOTICE OF APPEAL

75 CIV 5891 (MJL)

NOTICE IS HEREBY GIVEN that JOHN SNOW and JUDY SNOW, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of JUDGE HENRY F. WERKER filed in this action on July 22, 1977, denying defendants' motion for relief under Rule 60 (b)(1) of FRCP, and from the whole of said Order.

Dated: New York, New York
October 21, 1980

VOGEL & ROSENBERG

By _____
Donald B. Rosenberg
A Member of the Firm
Attorneys for Defendants
Office and Post Office Address
41 East 42 Street
New York, New York 10017
(212) 599-3337

To: McCANN, AHERN & SOMMERS, P.C.
Attorneys for Plaintiffs
347 Fullerton Avenue
P.O. Box 2335
Newburgh, N.Y. 12550
(914) 561-9400

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated:

.....

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

.....

.....

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF NEW YORK ss:

Iola Calabrese being sworn says: I am not a party to the action, am over 18 years of age and reside at New York County, New York

On October 21, 19 80, I served a true copy of the annexed Notice of Appeal in the following manner:

☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

McCann, Ahern & Somers, P.C., 347 Fullerton Ave., P.O. Box 2335, Newburgh, N.Y. 12550, atty. for plaintiffs

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on October 21, 19 80

DONALD B. ROSENBERG
Notary Public, State of New York
No. 03-3550430
Qualified in Westchester County
Commission Expires March 30, 1981

.....

(Print signer's name below signature)

Iola Calabrese

A-251

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------X

JOHN F. MEEHAN and ROBERT W. FINK, d/b/a MEEHAN & FINK,

Plaintiffs,

-against-

JOHN SNOW and JUDY SNOW,

Defendants.

----------x

NOTICE OF APPEAL

75 CIV 5891 (MJL)

NOTICE IS HEREBY GIVEN that JOHN SNOW and JUDY SNOW, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on September 24, 1980, and from the whole of said Judgment.

Dated: New York, New York
October 21, 1980

VOGEL & ROSENBERG

By _____
Donald B. Rosenberg
A Member of the Firm
Attorneys for Defendants
Office and Post Office Address
41 East 42 Street
New York, New York 10017
(212) 599-3337

To: McCANN, AHERN & SOMMERS, P.C.
Attorneys for Plaintiffs
347 Fullerton Avenue
P.O. Box 2335
Newburgh, N.Y. 12550
(914) 561-9400

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated: .....

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

☐ Individual Verification — in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

.....

.....

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF NEW YORK ss:

Iola Calabrese being sworn says: I am not a party to the action, am over 18 years of age and reside at New York County, New York

On October 21, 1980, I served a true copy of the annexed Notice of Appeal in the following manner:

☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

McCann, Ahern & Somers, P.C., 347 Fullerton Ave., P.O. Box 2335, Newburgh, N.Y. 12550, atty. for plaintiffs

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on October 21, 1980

.....

DONALD B. ROSENBERG
Notary Public, State of New York
No. 30-8350430
Qualified in Westchester County
Commission Expires March 30, 1981

S/

.....

(Print signer's name below signature)

Iola Calabrese